WOODROFFE AND AMEER ALI'S

LAW OF EVIDENCE

APPLICABLE TO BRITISH INDIA

NINTH EDITION

BY

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PREFACE

In the preparation of this Commentary on the Indian Evidence Act the Authors, as they stated in the First Edition of the work in 1898, have striven to meet the wants, both of the profession and of students, believing that a work framed merely for the use of one of these classes will prove unsuited to the needs of the other. Much that must be set out for those who have little or no knowledge of the subject, is superfluous to the professional reader, while the close and elaborate detail which the practising lawyer requires is not only useless, but often a source of confusion, to the beginner. The novel scheme of this work, which is designed to satisfy the wants of both classes of readers, demands a few words of explanation.

A Bibliography of works on the Law of Evidence (the only one, we believe, of its kind), revised to date, is followed by an Introduction on the Act. We have acquired the copyright of the Introduction to the Evidence Act of the late Sir James Fitzjames Stephen and have incorporated it in our own. The critical portion of the latter has been expanded chiefly in two particulars. A full statement has been given of Mr. Whitworth's criticism of Sir J. Stephen's theory of relevancy as embodied in the Act. Some apology may appear needed for the extensive citations we have made. If so, excuse will be found both in the instructive character of the criticism in Mr. Whitworth's pamphlet as also in the fact that it has been out of print for many years past. We have also thought it better to give, for the most part, the criticism in the author's own words rather than, as before, a summary of such criticism of our own.

The Act is divided into three Parts and eleven Chapters. Each Part and Chapter is preceded by an Introduction dealing with its subject-matter. The Introduction prefixed to the Parts or main divisions of the Act are more general in character and

broader in treatment than those which precede the Chapters, while these again exhibit less detail than is found in the notes appended to the sections Elementary notions are explained and a general, and sometimes historical survey of the subject of the sections is given in the several Introductions which also contain references to matters akin to, but not part of, the actual material of the Act While these Introductions will, as the Authors hope, be of aid to students, the separation of their subject matter from the commentary to which alone the profession will in general refer should spare the practitioner in search of decisions bearing directly upon the meaning of the sections unnecessary reading A short paragraph immediately follows each section presenting with all possible brevity the principle upon which it is founded and has been enacted This paragraph is succeeded by a note of cognate sections, which in turn is followed by a collection of references to standard English, American or Indian text books dealing with the material of the section The Authors are indebted in part for the idea of this arrangement to Mr S L Phipson's work on the Law of Evidence Next comes the Commentary proper on the section which elucidates its important words and phrases by the aid of the case law and text books

The work as thus finished departs in many respects from the original and advertised plan of its Authors At the outset they proposed to write a short Commentary for the use of the profession only and to collect therein the provisions of all other Acts on the Indian Statute book which touch upon this branch of the law They, however, realised in the course of their task that though a book so planned might be of assistance to members of the profession practising in the Presidency Towns with large libraries available for reference, it would yet be of little use to others in the mofussil The attempt to serve a wider circle of readers has entailed a large increase in the bulk of the work beyond the limits originally proposed while the length of time consumed in its preparation in its modified form has prevented the inclusion of that complete collection of provisions of other Acts bearing upon this branch of the law to which allusion has

[illegible] The [illegible] (taken from [illegible] Acts and [illegible]) will, however be [illegible] the Commentary. We have retained and revised the [illegible] to which the Act has been [illegible] the Law Commissioners' Report and Proceedings in Council. [illegible] the former Appendices on [illegible] and Bankers' Books, as separate [illegible] subjects and it is [illegible] in the ninth Edition of [illegible]. The Proceedings in Council prior to the passing of the Bill have not [illegible] been, generally considered [illegible] Sir James F. Stephen, [illegible] explanation of the Act by its chief framer and others who approved of, and were responsible for it.

The Authors desire to acknowledge the assistance they have derived from the standard works on the Law of Evidence: published in India, in England, and in America. In especial, much aid has been gained from the American text-books, amongst which are perhaps the most valuable and scientific works on this branch of the law. Amongst the text-books laid under contribution we wish particularly to indicate the work of Professor J. H. Wigmore (Treatise on Evidence: An Encyclopedia of Statutes and cases up to March, 1904, 4 vols., Canadian Edition, containing English cases) a valuable and exhaustive book written in an original and modern spirit and thus free of what Bentham calls "grimgribber nonsensical reasons" for the rules of evidence. The Law of Evidence as it obtains in the Courts of the United States, is founded upon the English Law and is in nearly every respect identical with the law which prevails in England and in India; and though it is not of binding authority upon Indian Judges, yet the decisions of those Courts are, as Lord Chief Justice Cockburn said in England (*Scaramanga* v. *Stamp*, L. R., 5 C. P. D., 295, 303), and Sir Lawrence Peel observed in India (*Braddon* v. *Abbot*, Tailor and Bell's Reports, 342, 359, 360; *Malcolm* v. *Smith*, ib., 283, 288), of great value to a correct determination of

questions for which our own or the English law offers no solution Any unnecessary and therefore excessive citation of this foreign law is to be deprecated (see *Missouri Steamship Co*, 42 Ch D, 321, 330, 331) The Indian case law has been examined and incorporated in the text up to June, 1929 Some cases after that date have been noted in the Addenda The Appendices have been revised to date and the Bibliography, which, so far as I know, is the only one of its kind has been both revised and considerably enlarged A recent helpful work for the practising lawyer is A S Osborn's Problem of Proof" It is instructive in this connection to note how few are the cases on evidence in the English Law Reports of recent years as compared with the past This circumstance is due to the growing sense of the inutility of many objections to evidence and to a desire to free all judicial enquiry of anything which, without sound and certain justification, may baulk or hinder it The dictum of the Judicial Committee in *Ameeroonissa Khatoon* v *Abedoonissa Khatoon*, 23 W R 208 209 now represents also the views of other English Courts It may however, be necessary to add that a proper interpretation and liberal application of the law is not the same thing as the abrogation of it In order, however, to find grist for the mills of the numerous Indian Journals a considerable number of cases are the subject of report which have not the importance which calls for it This observation, however, applies to all branches of the law

I wish to thank Mr Tapanmohan Chatterji, Barrister-at-Law, for help rendered in the preparation of this ninth edition, and for the correction of the proofs

30th September 1930 J W

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APPENDICES.

ADDENDA OF CASES

S 13 —The Evidence Act does not make finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case, where parties are not the same *Gopika Raman* v *Atal Singh* (1929) 56 Cal 1003 (P C), 31 Bom L R, 734, 56 A 119 56 M L J, 562

Where in a suit for ejectment by a *jaghirdar* the defendants sought to rely on judgments decided between landlords and certain other tenants in other villages on the ground that in those cases although not *inter partes*, the relation of *jaghirdar* to his tenants and the right under which he held was decided Held that the judgments in the other cases were not admissible in evidence *Pandu* v *Shivasankar*, (1929) 31 Bom L R., 335

S 21 —An admission made in a Court of Law no doubt carries with it great weight but it is not conclusive and binding on the party making it unless it operates as an estoppel The burden of proof, however, rests heavily upon the party and after him his heirs to show that the admissions were untrue *Bai Deimani* v *Parishankar* (1929) 53 Bom, 391

The statement that a document is a copy of the original is admissible when made by a deceased person in a document relating to a relevant fact and also as an admission under Section 21 *Seetrya* v *Subramanya* (1929) 56 I A, 146, 31 Bom L R, 756, 52 Mad, 453

Entries in Solicitors books of accounts regarding object of purchase for clients are neither inadmissible nor irrelevant, nor hearsay *Hariram* v *Madan*, (1929) 33 C W N 493 (P C), 31 Bom L R, 710, 57 M L J, 581, 27 A L J, 406

S 24 —A village *Punch* who is actively assisting the Police Officer in the investigation of the crime is a person in authority within the meaning of Section 24 of the Evidence Act. *Kunja Subuddhi* v *E*, (1929), 8 Pat, 289

A retracted confession is admissible in evidence but it should have no weight unless either corroborated in a material particular or unless the Tribunal comes to the conclusion that the statement as a whole is a truthful statement In either of these cases the retracted statement may be given full weight *Sheonara n* v *E*, (19[illegible]9), 8 Pat., 26[illegible]

There is no provision of law which forbids a magistrate from recording a confession on a Sunday or any other holiday and at a place other than the Court house *Akram* v *E*, (1930) 11 Lahore L. J, 461

S 26 —A Judge d Instruction in French India who is a sort of Committing Magistrate with power to commit or discharge a prisoner but not to convict, is a "Magistrate" within the meaning of Section 26, and a statement made to him by the accused while in police custody is admissible in evidence *In re Panchanathan [illegible]* (19[illegible]), 52 Mad., 52[illegible]

S 27 —Section 27 of the Evidence Act being a proviso to the two preceding sections must be strictly construed and any relaxation must be sparingly allowed, care being exercised to see that the purpose and object of Sections 25 and 26 and the safeguard provided in Section 27 are not rendered nugatory by any interpretation. *Legal Remembrancer* v *Bhajoo*, (1930) 34 C. W N., 106

S 31 —Under Section 31 of the Evidence Act admissions are not conclusive evidence of the matters admitted *Jagannath* v *Ka[illegible]das*, (1929) 8 Pat., [illegible]6.

S. 32 (3).—A Hindu widow who after a life long enjoyment of her husband's property desires at the end to pass it on to her own relations, and for the purpose goes through the form of adopting her brother's grandson, to effectuate which she is bound to allege an authority to adopt from her husband. Held, that a statement made by the deceased widow in

proceeding to obtain mutation of names in the register in favour of the adopted boy was not against her pecuniary or proprietary interest, and was not admissible in evidence under Section 32 (3) of the Evidence Act. *Dal Bahadur* v *Bijai Bahadur,* (1930), 57 I A, 14, 32 Bom L R., 487, 34 C W N, 369, 58 M L J, 446

S. 32 (4) —Where the question was whether certain property was dedicated to a *Wakf* and certain documents which related to neighbouring lands and which contained recitals as to the character of the property in suit were put in Held that they were admissible in evidence under Section 32 (4) *Munshi Busoid* v *Munshi Newaj*, (1929), 33 C W N, 439

S 32 (5) —An entry in the Scholars Register made by the father since deceased, as to his son's age would be admissible under Section 32(5) *Munna* v *Kameshari*, (1929), 5 O W N, 1111

A settlement pedigree can be admitted either under Section 32(5) or under Section 35 If the settlement pedigree is one signed by the members of the family it would be admissible under Section 32(5) But if the pedigree is prepared by the settlement officer after proper enquiry and bears his signature it can be admitted under Section 35 *Sharfaraz* v *Rajana*, (1929), 4 Luck, 39

S 33 —Where a witness was examined before the committing Magistrate, but his whereabouts could not be traced at the time the case was tried by the Sessions Judge and the evidence tendered before the Magistrate by that witness was taken into account Held, that there was nothing wrong or illegal in relying on such evidence *Jali* v *R*, (1929), 33 C W N, 918

The true reading of Section 33 of the Evidence Act is that the adverse party in the first proceeding had both the right and the opportunity of cross examining and not "the right or opportunity to cross examine" *Dal Bahadur* v *Bijai Bahadur,* (1930), 57 I A, 14

The method of proving a dying declaration is by examining the person who recorded the statement as to what the deceased said or to examine some person or persons who were present at the time and heard the statement being made Such a statement should go in as a whole or not at all The Judge cannot admit portion of it, where such a statement is put in, it is incumbent on the defence to claim an opportunity to cross examine the witness regarding the same If the defence omits to do so, it may be taken that they did not wish to cross examine *Tafiz* v *R*, (1930) 50 C L J, 584

S 35 —*Thak* statements have evidentiary value and are admissible in evidence, unless they deal with matters altogether outside the scope of the survey *Krishna Promoda Dassi* v *Dhirendra* (1929) 56 I A, 74, 56 Cal, 813

A certificate of guardianship issued in Oudh is a record made by a public servant in discharge of his official duties, and an entry in such a certificate is relevant and admissible in evidence in proof of the age of a particular person *Mehdi Ali* v *Kalayat Husain*, (1930), 7 O W N, 25, 121 I C, 277

S 40 —Section 40 applies to a case in which the Court has jurisdiction to decide a matter and one party says it should not do so because that matter has been decided before *Lakshan* v *Ramdas*, (1929), 49 C L J, 441, 33 C W N, 795

S 50 —That the proof as to whether there was a marriage between two parties is to include a consideration of the character and conduct of various relatives and an estimate is to be formed as to whether on the whole these relations prefer the tie of concubinage to that of marriage, is a wrong doctrine regarding proof of marriage The evidence on this subject should not be allowed as it is without competence. *Mohabbat* v *Mohomed Ibrahim*, (1929), 56 I A., 201, 33 C W N, 645, 31 Bom L R, 846, 57 M L J, 366, 27 A L J, 465

S 54 —Evidence of bad character including a previous conviction is as a rule irrelevant to help to establish an accused person's guilt, but that is not to lay down that it may not be taken into account in passing sentence *In re Suban Shahib* (1929), 52 Mad, 358

S 63 (5) —Survey and settlement report which was based on a *jamabandi* the original of which was not produced and which itself was not exhibited in evidence, cannot be treated

as secondary evidence of the contents of the *jamabandi* statement under clause (a) of Section 63 or under any other section of the Evidence Act *Surendranath v Kamakhya* (1930), 32 Bom L R 515

S 68 —Section 68 of the Evidence Act has no application to the Punjab and there is no law which requires sale deed in that Province to be attested *Maharajah of Faridkot State v Arjatram*, (1929) 10 Lahore 447

The amendment of Section 68 of Evidence Act by Act XXXI of 1926 is a provision relating to processual law and not substantive law, and therefore it must be taken to be retrospective in its operation *Thyammal v Muthu* (1929) 57 M L J 588

By Section 2 of Act XXXI of 1926 amending Section 68 of the Evidence Act where there was no specific denial of a registered mortgage by the persons by whom it purported to have been executed and all that the parties pleaded was that they did not admit the genuineness of the bond. Held, that it was not sufficient to put the Plaintiff to proof of attestation. *Biswanath v The Kayestha Trading and Banking Corporation Limited*, (1929) 8 Pat 450

S 80 —Section 80 of the Evidence Act does not deal with the question of admissibility of documents referred to therein but simply dispenses with the necessity of their formal proof by raising the presumption that everything in connection with them had been legally and correctly done *Padam v E*, (1929) 33 C W N, 1121 (F B)

S 90 —The presumption under Section 90 of the Evidence Act with regard to documents 30 years old arises in the case of copies as well as originals If the copy is proved to be a true copy a presumption may be made in favour of the genuineness of the original *Brij v Beni* (1929), 6 O W N, 880

Court may presume genuineness of signature authenticating a copy under Section 90 of the Evidence Act *Seethaya v Subranamya* (1929) 56 I A, 146

In the case of documents more than 30 years old, the genuineness of which is disputed, it is necessary for the Court to consider the evidence external and internal of the documents in order to enable the Court to decide whether in any particular case the Court should or should not presume proper signature and execution The Court is not bound to make the presumption merely because of the age of the document *Mansukh v Trikambhai*, (1929), 31 Bom L R, 1279

S 91 —From the mere fact that a Bill of Exchange or Hundi has been executed it does not necessarily follow that the whole of the contract between the parties has been reduced to the form of such a document *Kundan v Shahu*, (1929) 51 A, 530

S 92 —When property is purchased in the name of several persons jointly, a joint tenancy is created, and parol evidence is admissible to prove that the joint tenants have become tenants in common The evidence is tendered not for the purpose of contradicting or varying the terms of the conveyance but of proving fact from which it may be inferred that accepting the conveyance as creating a joint tenancy the purchasers have subsequently so dealt with their respective interests thereunder that the joint tenancy has become a tenancy in common *Tan Chew v Chee Swee*, (1929), 56 I A 112.

S 101 —Where in a suit for partition defendants resist by setting up acquiescence in their permanent right of occupancy in a part of the land the burden of proving existence of their rights is on them *Subramanya v Subramanya* (1929) 56 I A 218 52 Mad, 519, 31 Bom L R, 830, 33 C W N, 734

S 103 —Where once a mortgage has been admitted the *onus* is on the mortgagee to show that the mortgage has been extinguished by subsequent sale *Wali Mohammed v Mohamed Baksh*, (1930), 57 I A, 86, 11 Lah, 199, 32 Bom L R, 380

S 114 —The law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for a number of years. *Mohabbat v Mohamed Ibrahim*, (1929) 56 I A, 201

S 115 —Where in prior land acquisition proceedings there was a declaration that the minerals beneath a particular land would be used by Government for the purpose of construction of a bridge and the owner of the land received compensation on that footing and after the completion of the bridge he sued for a declaration that he was

entitled to the remaining minerals in the land Held, that he was not estopped from asserting such a claim *Secy of State* v *Gyanendra* (1929), 8 Pat, 742

In order that a representation may operate as an estoppel it must be a representation of an existing fact and not of mere intention or future promises Also estoppel does not confer title but is merely a rule of evidence *Hindusthan Co operative Insurance Society Ld* v *Secy of State* (1929), 56 Cal, 989

Where a lease was executed by the Nawab in contravention of the Murshidabad Act Held that he was not estopped from denying the validity of the lease *Nawab of Murshidabad* v *Bilas*, (1929) 56 Cal, 252

Where certain *Khoti* land was mortgaged and subsequently sold but the sale was invalid under Khoti Act Held, that the mortgagors could contend that the sale was void as being contrary to the Statute *Sheik Ahmed* v *Babu* (1929), 53 Bom 676

Where two Companies owning adjoining lands had for a long period employed a common agent who with the best of motives had permitted the defendant Company to build upon a certain site belonging to the plaintiff Company and it also appeared that the plaintiff Company did not repudiate that course for a considerable period Held, that the principle of *Ramsden* v *Dyson* was applicable and that the plaintiff Company could not sue to recover possession of the property All that the plaintiff Company will be entitled to is a fair rent *Gujrat Ginning and Manufacturing Co* v *Motilal Hirabhai Spinning Co*, (1929), 31 Bom L R 1310

S 126 —Where a Hindu widow applied through her pleader for Succession Certificate to the estate of her husband and the same was granted without the production of the will the contents of which had been disclosed to the applicant's pleader, and in a later proceeding the pleader was sought to be examined with reference to the will Held, that as the pleader became acquainted with the will in the course of and for the purpose of his professional employment he was privileged under Section 126 of the Evidence Act Held also that the circumstances that the widow was willing to tender the will in Court or that its contents had otherwise been made known was entirely immaterial. *Bai Kanta* v *Bhailal*, (1929), 31 Bom L R, 1046

TABLE OF CASES CITED.

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BIBLIOGRAPHY.

The Bibliography here given is by no means strictly complete Omitted therefrom are (1) Works on psychology logic and rhetoric, (2) Works of the civilian and scholastic jurists [such as the Corpus Juris Glossatum, Heineccius on the Pandects Mascardus De Probationibus, Menochius De Præsumptionibus, Endemann's Beweislehre Weiske's Rechtslexicon Savigny's Romische Recht, Puffendorf Grotius Cujaccius Voet, Hertius, Strykius, Puchta, Hefter and others], (3) Works on Continental law, (4) Works incidentally, but not specifically and directly, dealing with the subject of Evidence [as, for example, Russell on Crimes, Foster's Crown Law Hawkin's Pleas of the Crown, Blackstone's Commentaries, Collinson, Pope and Shelford on Lunacy, Bishop on Marriage and Divorce, etc, etc, all of which, as also other works treating of the law generally or its specific branches contain incidentally much matter relating to the subject or general digest, *e g*, Company s digest, *sub voc* 'estoppel', Buller s *Nisi Prius* or the like], (5) Articles in Legal Magazines [of which there are a great number] The lists given contain for the most part well known practical works specifically dealing with the subject, and in present or past use by the profession —Ed

(A) CHRONOLOGICAL CLASSIFICATION

(Works on the English Scotch and American Laws of Evidence)

1735 The Law of Evidence wherein all the cases that have yet been printed in any of our Law Books or trials, and which in any wise relate to points of Evidence are collected and methodically digested under their proper heads with necessary table to the whole

2nd Ed, *London*, 17[illegible]

[The anonymous author observes in his Preface that prior to this collection there was nothing of this nature extant besides the 11th Chapter of a Book entitled [illegible] which was very defective Ed]

1744 Nelson (W)—The Law of Evidence Third Edition

London 17[illegible]

1756 Gilbert—The Law of Evidence, by Lord Chief Baron G[illegible]

London [illegible]

[2nd Ed (?), 3rd Ed, 1769 4th Ed, 1777, 5th Ed, 1791—1796; [illegible] by James Sedgwick This is the first of the recognised text books [illegible] Mr Best (Ev, p 70) says that it is to Lord Chief Baron Gilbert, that we are [illegible] indebted for reducing our law of evidence into a system Ed]

1761 Theory of Evidence

[This anonymous work is in substance Part VI of the anonymous [illegible] of what afterwards appeared as Buller s *Nisi Prius*, it is found also [illegible] editions Thayer's Cases on Evidence p 1028]

London [illegible]

1801 Peake—A Compendium of the Law of Evidence, by [illegible]

[4th Ed, 1813] *London*, [illegible]

1802 McNally—The Rule of Evidence on Pleas of the Crown, illustrated from Printed and Manuscript Trials and Cases, by Leonard McNally, 2 vols.

London and Dublin, 1802

1810 Swift—A Digest of the Law of Evidence in Civil and Criminal Cases, by Zephaniah Swift, one of the Judges of the Supreme Court of the State of Connecticut

Hartford, 1810

1812 M'Kinnon—The Philosophy of Evidence, by Daniel M'Kinnon

London, 1812

1814 Phillips and Ames—A treatise on the Law of Evidence, by the Right Hon S March Phillips and Ames and (subsequently) Thomas James Arnold

London, 1814

[2nd Ed, 1815, 3rd Ed, 1817, 4th Ed, 1820, 5th Ed, 1822 6th Ed, 1824, 7th Ed, 1829 8th Ed, 1838 9th Ed, 1843, 10th Ed, 1852 (latest) Ed]

1820 Glassford—An Essay on the Principles of Evidence and their *application to subject of judicial enquiry, by James Glassford*

Edinburgh, 1820

1824 Starkie—A practical treatise on the Law of Evidence by Thomas Starkie, 3 vols

London, 1824

[2nd Ed, 1833 (2 vols), 3rd Ed, 1842 (3 vols), 4th Ed, 1853 (latest) by George Morley Dowdeswell and John George Malclom There is an American Edition (10th, 1876) taken from the fourth English Edition with references to American Cases by George Sharswood *Philadelphia*, 1876, Ed]

1825 Bentham—A treatise on Judicial Evidence extracted from the Manuscripts of Jeremy Bentham, Esq, by M Dumont, Member of the Representative and Sovereign Council of Geneva Translated into English

London, 1825.

[*A translation of Dumont's "Traite des Preuves Judiciares," published in 1823, v post*, 1827 Ed]

1825 Espinasse—A practical treatise on the settling of evidence for trial at *Nisi Prius* and on the preparing and arranging the necessary proofs, by Isaac Espinasse

London, 1825

[This is a 2nd Ed *quære* date of first Ed]

1825 Uniacke—Evidence forming a title of the Code of legal proceeding according to the plan proposed by Crofton Uniacke, Esq, by S B Harrison

London, 1825.

[An early attempt at codification Ed]

1827 Bentham—Rationale of Judicial Evidence specially applied to English Practice from the Manuscripts of Jeremy Bentham, Esq, Bencher of Lincoln's Inn, in five volumes Ed John S Mill

London, 1827.

[The papers from which this work was extracted were written by Bentham at various times from the year 1802 to 1812 They comprise a very minute exposition of his views on all the branches of the subject of Judicial evidence intermixed with criticisms on the Law of Evidence as it was established in England and with incidental remarks on the state of that branch of law in most of the continental systems of jurisprudence Bentham's speculations on Judicial Evidence had already been published in a more condensed form by M Dumont of Geneva in the "Traite des Preuves Judiciares," published in 1823, an English translation of which appeared in 1825 See *ante*, and the Preface of J S Mill As

Professor Wigmore says in less than three generations nearly every reform which Bentham advocated for the Law of Evidence has come to pass Law of Evidence, vol iv § 2251 Ed]

1827 MATHEWS (J H)—A treatise on the doctrine of presumption and presumptive Evidence as affecting the title to real and personal property

London, 1827

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London, 1827

[*Quære* title of first Edition 2nd Ed 1831 3rd Ed, 1834, 4th Ed, 1836, 5th Ed, 1839 6th Ed, 1844 7th Ed, 1849, 8th Ed, 1851 9th Ed, 1858, 10th Ed, 1861, 11th Ed, 1866 12th Ed 1870 13th Ed, 1875 14th Ed, 1879, 15th Ed, 1884, 16th Ed, 1891 17th Ed 1900 2 vols 18th Ed 1907 19th Ed, 1922 Ed]

1830 GRADE—A practical treatise on the General Principles and Elementary Rules of the Law of Evidence, by Richard Grade

London, 1830

1831 WIGRAM—An Examination of the Rules of Law respecting the admission of extrinsic evidence in aid of the interpretation of wills, by the Right Hon Sir James Wigram

London, 1831

[2nd Ed, 1835, 3rd Ed, 1840, 4th Ed, 1858, 5th Ed, 1914 Ed]

1834 TAIT—A treatise on the Law of Evidence in Scotland by George Tait

Edinburgh, 1834.

[This is the 3rd Edition by Adam Urquhart Ed]

1835 ROSCOE—Roscoe's Digest of the Law of Evidence in Criminal Cases

London, 1835

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1836 GRESLEY—A treatise on the Law of Evidence in the Courts of Equity, by Richard Newcombe Gresley

London, 1836

[A work dealing with the system of evidence prevalent in the Court of Chancery, 2nd Ed, 1847 (latest), by Christopher Alderson Calvert Ed]

1838 WILLS—An Essay on the Principles of Circumstantial Evidence, by William Wills

London, 1838

[*Quære* date of 2nd Ed, 3rd Ed, 1850, 4th Ed, 1862, 6th Ed, 1912, edited by Alfred Wills Ed.]

1842 GREENLEAF—A treatise on the Law of Evidence, by Simon Greenleaf, LL D

Philadelphia, 1842

[1st Ed, in one vol 2nd Ed, 1844—1846, 3rd Ed, 2 vols, 1846, *quære* as to subsequent editions until 1896 the date of the last edition in 3 vols revised with additions by William Draper Lewis who states in his preface that in upwards of 20,000 cases on evidence the Courts have referred to some section of Mr Greenleaf's work to support their decisions Ed]

1842. JOY—A treatise on the Admissibility of Confessions and Challenge of Jurors in Criminal Cases in England and Ireland, by Henry H Joy.

Dublin, 1842.

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London, 1843.

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London, 1844

[The 1844 Ed is the only edition of this work Ed]

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London, 1844

1848 TAYLOR—A treatise on the Law of Evidence as administered in England and Ireland with illustrations from American and other foreign Laws, by His Honour Judge Pitt Taylor

London, 1848

[*Quære* title of first edition, 2nd Ed, 1855, 3rd Ed 1858, 4th Ed, 1864 5th Ed, 1868, 6th Ed, 1872, 7th Ed, 1878 8th Ed, 1885, 9th Ed, 1895, 10th Ed, 1906, by W E Hume Williams, K C, 11th Ed, 1920]

1849 BEST—The Principles of the Law of Evidence with elementary rules for conducting the examination and cross-examination of witnesses, by W M Best

London, 1849

[2nd Ed, 1855, 3rd Ed, 1860, 4th Ed, 1866, 5th Ed, 1870, 6th Ed, 1875 7th Ed, 1883, 8th Ed, 1893 by J M Lely, with Notes to American and Canadian Cases by Charles F Chamberlayne of the Boston Bar 9th Ed, 1902, 10th Ed, 1906, 11th Ed, 1911]

1850 MAUNSELL (W T)—The Law of Accessories in felony and the evidence of accomplices 1850

1850 PHILLIMORE—The History and Principles of the Law of Evidence as illustrating our social progress, by John George Phillimore

London, 1850

1855 DICKSON—A treatise on the Law of Evidence in Scotland, by William Gillespie Dickson 2 vols

Edinburgh 1855

[2nd Ed, 1864, 3rd (?) 1887, by P J Hamilton Grierson Ed]

1856 POWELL—Powell's Principles and Practice of the Law of Evidence

London, 1856

[*Quære* title of first edition, 2nd Ed, 1859, 3rd Ed, 1868 4th Ed, 1875 5th Ed, 1885, 6th Ed, 1892, 7th Ed, by John Cutler and Charles F Cagney, 9th Ed 1910, 10th Ed, 1921 The law is here reduced to the form of general rules with a running commentary thereto attached Ed]

1858 STEPHEN (Sir J F J)—The practice of interrogating person accused of Crime

London, 1858

1861 RAM—A treatise on Facts as subjects of Enquiry by a Jury, by James Ram.

London 1861

[There is an American Edition (the 4th New York 1890) by J Townshend and C F Beach with an Appendix containing D P Brown s Golden Rules for the examination of a witness Coxe s advice for conducting the examination for witness and opening a case to the jury Whewell on Theory and Fact Hoffman s fifty resolutions in regard to professional department cases of mistaken identity and erroneous conviction Ed]

1861 WORSLEY (F)—Expediency of passing an Act to permit defendants in Criminal Courts and their wives or husbands to testify on oath

London 1861

1863 BLUNDELL (B)—Testimony on Oath in Criminal Cases 1863

1863 STEPHEN (Sir J F J)—On trial by jury and the evidence of Experts

London 1863

1865 BADDELY—Privilege of confessions religions by Baddely

1865 WADDILOVE (A)—On the amendment of the Law of Evidence in order to a limit the testimony of parties in all Civil Suits and of defendants in Criminal Trials

London 1865

1868 BURRILL—A treatise on the Nature Principles and the Rules of Circumstantial Evidence especially that of the presumptive kind, in criminal cases by A M Burril

New York 1868

1868 NORTON (J B)—Notes on evidence extracted from the works of Best etc 1868

1870 KERR (W W)—The Law of Discovery

London 1870

1871 HOPWOOD (E H)—On the law relating to Confessions in Criminal Cases

London 1871

1871 MAURICE (F D)—Ought any person to be excluded from giving evidence on the ground of religious unbelief

London 1871

1872 BIGELOW—A treatise on the Law of Estoppel and its application in Practice by Melville M Bigelow

Boston 1872

[*Quære* date of 2nd and 3rd Eds 4th Ed 1886 5th Ed 1890 6th Ed 1913 Ed]

1876 STEPHEN—A Digest of the Law of Evidence, by Sir James Fitzjames Stephen

London 1876

[Reprinted with slight alterations September 1876 December 1876 with many alterations 1877 2nd Ed 1881 3rd Ed 1887 4th Ed 1893 11th Ed 1925 There is also an American Edition (Boston 1886) from the fourth English Edition with Notes from American cases including those of J W May Ed]

1877 WHARTON—A Commentary on the Law of Evidence in Civil Issues, by Francis Wharton LL D

Philadelphia 1877

[2nd Ed 1879 3rd Ed 1888 (latest) Ed]

1879 NASMITH (D)—The institutes of English adjective law (procedure in Court) embracing an outline of the Law of Evidence

London, 1879

1879 PHILLIPS—Famous cases of Circumstantial Evidence, by S M Phillips

Jersey, 1879

[This is the 4th American Edition of the English work by the author of Phillips on Evidence Ed]

1880 BEST—An Exposition of the Practice relative to the Right to Begin and Reply, by W M Best

Burlington, N J, 1880

[This is an American Edition of the English work *Quære* date Ed]

1880 WHARTON—A treatise on the Law of Evidence in Criminal Issue, by Francis Wharton, LL D 8th Ed

Philadelphia, 1880

[8th Ed 1880, 9th Ed., 1884, 10th Ed, 1912 Previous to 1880, the date of the 8th Ed, this book was one of the volumes of the same author s Treatise on Criminal Law, the editions of which are as follows 1st Ed, 1846, 2nd Ed., 1852 3rd Ed, 1855 4th Ed, 1857, 5th Ed, 1861 6th Ed, 1868, 7th Ed, 1874 In the same manner Dr Wharton's Treatise on Criminal Pleading and Practice, 9th Ed (1889) was, previous to 1880 the date of the 8th Ed, one of the volumes of his abovementioned Treatise on Criminal Law Ed]

1882 KIRKPATRICK (J)—Digest of the Scottish Law of Evidence 1882

1883 REYNOLDS—The Theory of the Law of Evidence as established in the United States and of the Conduct of the Examination of Witnesses by W Reynolds

Chicago, 1883

[2nd Ed, 1890, 3rd Ed, 1897 Ed]

1883 ROGERS—The Law of Expert Testimony, by H W Rogers, LL.D

St Louis, Mo, 1883

[2nd Ed, 1891, re written and enlarged Ed]

1884 EVEREST AND STRODE—The Law of Estoppel, by L F Everest and E Strode

London, 1884

1885 GRAY—A treatise on Communication by Telegraph, by Morris Gray

Boston, 1885

[A fourth of this book deals with the subject from the point of view of the Law of Evidence Ed]

1886 LAWSON—The Law of Presumptive Evidence including presumptions, both of law and of fact, and the burden of proof both in Civil and Criminal Cases, by John D Lawson.

San Francisco 1886

[The law of presumptive evidence is here reduced to definite rules Ed]

1886 LAWSON—The Law of Expert and Opinion Evidence reduced to rules, by John D Lawson

San Francisco 1886

1886 WOOD—Practice Evidence for ready use in the trial of causes, by H G Wood

New York, 1886

1887 RAPALJE—A treatise on the Law of Witnesses, by Stewart Rapalje

New York, 1887

1887 SICHEL—The Practice relating to Witnesses in all matters and proceedings, Civil and Criminal, at, after and before the trial, or hearing both in the superior and inferior Courts, by Walter S Sichel

London, 1887

1887 WARNER—Law of Evidence under the Code of Civil Procedure of the State of New York, by Henry E Warner

Albany 1887.

1888 CABABÈ—An Essay on the Principles of Estoppel by M Cababè

London, 1888.

889 HAGEMAN—Privileged Communications as a branch of Legal Evidence, by John Frelinghuysen Hageman

New Jersey 1889

1889 JAMES—The Ohio Law of Opinion Evidence expert and non-expert, by Franci B James

Cincinnati 1889

1891 ABBOTT—A brief on the modes of proving the facts most frequently in issue or collaterally in question on the trial of Civil or Criminal Cases, by Austin Abbott of the New York Bar

New York, 1891

[3rd Ed 1912]

[By the same author A brief for the trial of civil issues before a jury and A brief for the trial of criminal cases *See* also 1895 Ed]

1892 HARRIS—A treatise on the Law of Identification by G E Harris

Albany 1892

[Identity of persons and things—animate and inanimate—living and dead—mistaken identity—*corpus delicti*—opinion evidence The author omits the subjects of poisoning and drowning Ed]

1892 PHIPSON—The Law of Evidence by Sidney L Phipson

London 1892

[2nd Ed. 1898 3rd Ed 1902, 4th Ed, 1907, 5th Ed 1911[6th Ed, 1921, 7th Ed 1930]

1892 RICE—The General Principles of the Law of Evidence with their application to the trial of civil actions and criminal cases, 3 vols by Frank S Rice

Rochester, N Y, 1892

[The first two volumes deal with civil actions and the third with criminal cases Ed]

1892 THAYER—Select Cases on Evidence at the Common Law with notes by J B Thayer LL.D, Professor of Law at Harvard University

Cambridge 1892

[The only writer who has added much to our knowledge of the principles of evidence since Bentham Sir William Markby in Preface to his Ind an Evidence Act]

1893 BROWNE—A treatise on the Admissibility of Parol Evidence in respect to written instruments by Irving Browne

New York 18[illegible]

1894 HAGAN—A treatise on Disputed Handwriting and the determination of genuine from forged signatures The character and composition of ink [illegible] their determination by chemical tests The effect of age on documents [illegible] W E Hagan Expert in Handwriting

New York [illegible]

[See also Le Faux—Maquillage Decalquage Graphotypie par Custave [illegible] 1898 Ed]

1894 WILLS—The Theory and Practice of the Law of [illegible] William Wills

[illegible]

1895 ABBOTT—Select cases in the Law of Evidence as applied during the examination of witnesses, by Austin Abbott, LL.D

New York, 1895

1895 WILLIAMS AND MACKLIN—The taking of Evidence on Commission, by W E Hume Williams and A Romer Macklin

London, 1895

1896 JONES—The Law of Evidence in Civil Cases, by Burr W Jones, 3 vols

San Francisco, 1896

1896 THAYER—A Preliminary Treatise on Evidence at the Common Law, Part I, Development of Trial by Jury, by J B Thayer, LL D

Boston, 1896

1896 WILL—A treatise on the Law of Circumstantial Evidence, by Arthur P Will

Philadelphia, 1896

1897 BROWNE—Short Studies in Evidence, By I Browne

U S, 1897

1897 GILLETT (J H)—Indirect and Collateral Evidence

U S, 1897

1898 ALLEN (W B)—The Criminal Evidence Act with a short history of the Act by Sir H B Poland, 1898

1898 BRADNER—Rules of Evidence as prescribed by the Common Law for the trial of actions and proceedings, by George W Bradner

Chicago, 1898

1898 BUTTERWORTH—The Criminal Evidence Act By A R Butterworth

London, 1898

1898 JELF—The Law of Evidence in Criminal cases under the Act of 1898, by Ernest Arthur Jelf

London, 1898

1898 MORGAN (C B)—Criminal Evidence Act, 1898

1898 STEPHEN (SIR H)—Prisoners on Oath, present and future

London, 1898

1898 THAYER—A Preliminary Treatise on Evidence at the Common Law, by James Bradley Thayer, LL D

London, 1898

[This is the full work of which the volumes published in 1896 contained the first four Chapters Ed.]

London, 1898

1899 STRAKER—Compendium of Evidence, by D Augustus Straker

Detroit, 1899

1900 EWART (J S)—Exposition of the Principles of Estoppel by misrepresentation 1900

1902 CANADA—The Criminal Code of Canada and the Canadian Evidence Act, Montreal, 1902 and Toronto, 1910

1902 FWBANK (L. B)—Indiana Trial Evidence
Indianapolis, 1902

1902 TREMEEAR (W J)—Criminal Code and Law of Criminal Evidence in Canada
Toronto, 1902

1903 10 CAMP (E W) AND CROW, (J F)—Encyclopædia of Evidence, 14 volumes
U S, 1903–10

1903 WELLMAN (F L)—The art of cross-examination
N Y 1903

1904 BODINGTON—Outline of the French Law of Evidence, By O E Bodington
1904

1904 ELLIOTT (B K and W F)—Treatise on the Law of Evidence 4 vols
Indianapolis, 1904 5

1904 WIGMORE (J H)—Treatise on the Law of Evidence 1904 15 5 vols

1904 WIGMORE—Treatise on Evidence An Encyclopædia of Statutes and cases until March 1904 Canadian Edition in 4 vols, by J H Wigmore 5 vols 1904

1905 *GULSON (J R)—Philosophy of Proof in its relation to the English* Law of Judicial Evidence
1905

1905 KNOWLES (V D)—Evidence in Brief 1905
[2nd Ed 1910]

1906 CHADMAN (C E)—Criminal Procedure and Evidence
1906

1906 HUGHES (T W)—Illustrated Treatise on the Law of Evidence
U S, 1906

1906 KENNEDY (R L)—Trial Evidence
U S, 1906

1906 WILSHERE (A N M)—Outlines of evidence and procedure in an action in the King's Bench Division
1906.
[2nd Ed 1913]

1907 COCKLE—Leading Cases on the Law of Evidence By E Cockle
1907.
[2nd Ed, *1911* 3rd Ed, *1915*]

1907 HAMMON (L L)—On Evidence
U S, 1907.

1907 MCKELVEY (J J)—Handbook of the Law of Evidence, 2nd Edition
U S, 1907.

1907 REYNOLDS (A E)—Brief Summary of the Law of Evidence
1907

1908 KINGSFORD (R E)—Evidence and Practice at Trials in Civil Cases

Toronto, 1908

[Another Ed, in 1911]

1908 PHIPSON (S L)—Manual of the Law of Evidence, 1908

[2nd Ed 1914 3rd Ed, 1921]

1910 UNDERHILL (H C)—Treatise on the Law of criminal evidence

Indianapolis 1910

1911 CHAMBERLAYNE—Treatise on the Modern Law of Evidence By C F Chamberlayne

N Y 1911

1911 DE COLYAR (H A)—Notes on the Presumption of Death

London 1911

1911 MAUDE (W C)—Justice's Handbook of the Law of Evidence 1911

1912 HIBBERT (W N)—Law of Evidence 1912

[2nd Ed, 1915, 3rd Ed, 19?0, 4th Ed, 1922]

1912 REYNOLDS (W)—Trial Evidence The Rules of Evidence and the Conduct of Examination of Witnesses

U S 1912

1912 RICHARDSON (W P)—Outlines of Evidence

U S 1912

1913 THROCKMORTEN (A H)—Illustrative Cases on Evidence

U S, 1913

1913 TURNER (F G)—New Jersey Law of Evidence

U S 1913

1913 WIGMORE (J H)—Principles of Judicial Proof

U S 1913

1913 WIGMORE (J H)—Select Cases on the Law of Evidence Second Edition

U S, 1913

1914 CARLSON (M)—Handwriting Testimony and kindred subjects

California 1914

1914 HENRY (J M)—Pensylvannia Trial Evidence

U S, 1914

1914 MACNEAL (J A.)—Law of Evidence in Civil and Criminal Cases

U S 1914

1915 LOCKHART (W S)—Handbook of the Law of Evidence for North Carolina

U S, 1915

1915 PERKINS (W D)—Evidence by Survivor

U S 1915

1915 TREGARTHEN (J B C)—Law of Hearsay Evidence 1915

1915 WIGMORE (J H.)—Pocket code of the rules of evidence in trials at law

U S, 1915

1915 WROTTESLEY (F J)—Examination of witnesses in Court, including examination in-chief, cross-examination and re-examination 1915

1916 CARTER (J P)—Law of Evidence

U S, 1916

1916 WILLIS (J W)—A digest of the rules and practice as to interrogatories for the examination of witnesses in Courts of Equity and Common Law with precedents

London, 1916

1917 HOLT (L. V) Outlines of the Rules of Evidence 1917

1917 HUGHES (T W)—Pocket Digest of Evidence

U S 1917

1917 WATSON (C S)—Inquiry into the basis and development of the principal rules of evidence in English Law 1917.

1918 ABBOTT—Trial Evidence By A. Abbott 3rd Edition, 3 vols

U S, 1918

1919 ARCHER—The Law of Evidence By G L Archer

U S, 1919

1919 CHAMBERLAYNE—Handbook on Evidence By C F Chamberlayne *U S*, 1919

1921 HUGHES (T W)—Cases on the Law of Evidence

U S, 1921.

1921 MEDINA (H R)—Summary of the Law of Pleading, Practice and Evidence in the State of New York 4th Edition

U S, 1921.

1926 OSBORN—The Problem of Proof 2nd Edition

U S, 1926

[A discussion of the proof of the facts in Courts of law with some general comments in the conduct of trials]

WORKS ON THE LAW OF EVIDENCE IN INDIA

1858 NORTON—The Law of Evidence applicable to the Courts of the Late East India Company explained in a course of lectures delivered by the Hon'ble John Bruce Norton Barrister at-Law, Advocate General of Madras

Madras, 1858

[2nd Ed, 1859, 3rd, *quære* date, 4th Ed, 1865, 5th Ed, *quære* date, 6th Ed, 1868, 7th Ed 1869 This book contains the substance of the lectures the author delivered as Professor of Law in the Madras Presidency College]

1862 GOODEVE—The Law of Evidence as administered in England and applied to India, by Joseph Goodeve, Barrister at law, Acting Master of the Supreme Court of Calcutta, and Lecturer on Law and Equity in the Presidency College

Calcutta, 1862

[In the preface the author says —" Some progress had been made in the work before he had become aware of the existence of, and more before he had seen, the able treatise of Mr Norton—' The Law of Evidence applicable to the Courts of the East India Company,'—a treatise, however, which in effect addresses itself still more generally to the Law of Evidence and, of course to English as well as Indian Law, and which is justly entitled to a higher and more ambitious designation Regard being had, however, to the somewhat differing scope and character of the two works, and the wideness of the field open to both, it was felt that there was still abundant room for each, and the author persevered in his original design it is trusted that the *practical* character to which at the same time it aspires will not make it useless to those of more advanced position" The author subsequently, and in 1872 after the passing of the Evidence Act, published a Supplement to this book Ed.]

1862 KINDERSELY—A Manual of the Law of Evidence of the Madras Province, by J R Kindersely, Madras Civil Service and of Lincoln's Inn

[This is the date of the 2nd Edition 3rd Ed, 1865 Ed]

1867 FIELD—The Law of Evidence in British India, by C D Field

Calcutta, 1867

[2nd Ed, 1873, 3rd Ed, 1878, 4th Ed, 1884 5th Ed, 1891, 6th Edn, 1907; 7th Ed 1920, 8th Ed 1928 The preface of the first edition is dated 1st May 1867 The first edition dealt in Part I with the general outlines of the Law of Evidence In Part II, the Old Evidence Act (II of of 1855 was reprinted and notes were appended to its sections The sections of two other Acts touching the subject of evidence was also reprinted with annotations, viz, ss 98 145—150 202—205 366 145, 154 of Act XXV of 1861 (Cr Pr Code), ss 4, 20 of Act XIV of 1859 (Limitation) In the preface the author, as his apology for coming before the public on ground already occupied by the able works of Mr Norton and Mr Goodeve, says — These works have long since taken *their* appropriate places in the Indian Law Library beyond the reach of competition or criticism The present publication seeks to fill a place, which the author ventures to think is as yet unoccupied It is intended to be a small practical treatise solely for Mofussil use and for the Mofussil Courts ' The author in his preface to the 2nd Edition published after the appearance of this Act (April 1873), which preface is reprinted in the last edition, says that ' it is rather a new book than a new edition, the contents having increased three fold and the matter of the first edition (so far as it was then relevant) having been recast in a new shape " Ed]

1869 LE FANU (HY)—Manual of Question and Answer upon the Indian Penal Code, the Law of Evidence, etc

Madras 1869

1872 CUNNINGHAM—The Indian Evidence Act (I of 1872), together with an Introduction and Explanatory Notes, Rulings of the Courts and Index by Sir Henry Stewart Cunningham, K C I E

Madras, 1872.

[4th Ed, 1878, 9th Ed, 1894, 10th Ed, 1899, 11th Ed, 1908]

1872 GOODEVE—The Indian Evidence Act (I of 1872) being a Supplement to "The Law of Evidence as administered in England and applied to India" By Joseph Goodeve

Calcutta, 1872

[See *ante* 1868 for author's principal treatise Ed]

1872 STEPHEN—An Introduction to the Evidence Act The Principles of Judicial Evidence, by James Fitzjames Stephen, Q C

London, 1872.

[Several times reprinted, last reprint Calcutta, 1904 Ed]

1873 NORTON—The Law of Evidence applicable to India adapted to the Indian Evidence Act (I of 1872), by John Bruce Norton, late Advocate-General of Madras

Madras, 1873

[8th Ed, 1873, 9th Ed, 1877 Edited by W M Scharlieb The 8th and 9th Editions are apparently so styled in continuation of the editions of the author's previous work first published in 1858]

1875 WHITWORTH—The Theory of Relevancy for the purpose of Judicial Evidence, by George Clifford Whitworth, Bombay Civil Service

Bombay, 1875

[2nd Ed, 1881 Ed]

1882 LEWIS—The Indian Evidence Act with speeches delivered by the Law Member, with reference to the Indian Evidence Bill, etc, by C G Lewis

Calcutta, 1882

1890 GRIFFITH—The Indian Evidence Acts (I and XVIII of 1872) with an Introduction on the Principles of Judicial Evidence and Commentaries, by William Griffith Barrister-at-Law

London, 1890.

1893 BROUGHTON—Estoppel by Matter of Record in Civil suits in India, by L. Broughton

London, 1893.

1893 CASPERSZ—The Law of Estoppel in British India (Tagore Law Lectures 1893) by Arthur Caspersz

Calcutta, 1893

A second edition was published in 1896 under the title Estoppel by representation and *Res Judicata*. 3rd Ed, 1909, 4th Ed, 1915 Ed]

1894. CHAND—A treatise on the Law of Res Judicata, by Hukm Chand.

London, 1894.

Printed at Bombay Ed]

1894 MITRA AND SIRCAR—The Case-noted Evidence Act, by Bijay Keshab Mitra and Ashutosh Sirkar, B.L.

Calcutta, 1894

1894. RAHA (P K.)—Analysis of Best's Principles of the Law of Evidence.

1894. SARKAR—The Indian Evidence Act with notes, illustrative cases and other explanatory remarks and comments, etc, by Kishori Lall Sarkar, M.A., B.L.

Calcutta, 1894.

[2nd Ed., 1894. *Quære* date of 1st Edition Ed]

Calcutta, 1894.

1895 MITRA—The Law of Evidence in British India with Notes, etc., by A. C Mitra

Calcutta, 1895.

1895 MORISON (H. N)—Advocacy and Examination of Witnesses

Calcutta, 1895

[2nd Ed 1905]

1896 BANERJI—The Indian Evidence Act (No I of 1872 as amended by Act XVIII of 1872), together with an Introduction and Explanatory Notes, Rulings of the Courts and Index, by Tarapada Banerji, B L

Calcutta, 1896

1897 MARKBY—The Indian Evidence Act with notes, by Sir William Markby, K.C.I.E., late a Judge of the High Court of Judicature at Calcutta, Reader in Indian Law in the University of Oxford

London, 1897

1898 VIJAYARANGA PILLAI—Guide to the Indian Evidence Act, as amended 1898

1903 CHAUDHURI (PRASANNA NARAYANA)—Confession and Evidence of Accomplice

[illegible]

1906 ARNOLD—Psychology applied to Legal Evidence

[illegible]

[2nd Ed., 1913]

W, LE

1907 MONNIER (E E)—The Law of Confessions

Calcutta, 1907

1908 JANAKI NATHA PALA—Indian Evidence Act of 1872 1908

1908 THIKAMLAL RANCHODLAL DESAI—Law of Evidence English and Indian

Bombay 1908.

1912 Guide to the principles of the Law of Evidence and the Indian Evidence Act

Madras, 1912

1913 CRANENBURGH (D E)—Criminal Evidence being the Indian Evidence Act

Calcutta, 1913.

1913 TARAPADA BANDYOPADHYAYA—Indian Evidence Act as amended to 1899

Calcutta, 1913

1914 KINNEY (A P)—Students' Guide to the Law of Evidence in India

Calcutta 1914.

1914 NARASIMHACHARI—Law relating to burden of proof in British India

Madras, 1914

1915 EGGAR (A.)—A pocket book of Common Sense extracted from the case law relating to Evidence in British India

Rangoon, 1915.

1915 MAHIMA CHANDRA SARKAR—The Students' Indian Evidence Act, 1872

Calcutta 1915

1915 PRANASANKARA TRIPURASANKARA—The Law of Evidence simplified

Surat 1915

1916 EGGAR (A) Evidence

Madras 1916.

1916 KAMALANANDA—Guide to the Indian Evidence Act, 1872

Gorakhpur, 1916

1918 DONOGH (W R)—Principles of Circumstantial Evidence applicable to British India

Calcutta, 1918

[2nd Ed, 1922]

1918 HARENDRA NATH MAITRA—Case noted Indian Evidence Act, 1872.

Sibpur, 1918

1919 RATANLALA RANCHHODDARA AND DHIRAJLALA KESAVLALA THAKURA—The Indian Evidence Act

Bombay, 1919

(B) CLASSIFICATION BY NAMES OF AUTHORS

NOTE —For the works of the Authors, see the entry given in the previous list against the date mentioned in this

(AUTHORS OF WORKS ON THE ENGLISH, SCOTCH AND AMERICAN LAWS OF EVIDENCE)

Abbott, 1891, 1895
Allen, 1898
Anonymous 1735 1761
Archer, 1919
Bentham, 1825 1827
Best, 1844 1849 1880, 1911
Bigelow, 1872
Bodington 1904
Bradner, 1898
Browne, 1893 1897
Purrill 1868
Butterworth *1898*
Cababè, 1888.
Camp 1903
Canadian Act 1902
Carter, 1916
Chadman, 1906
Chamberlayne, 1911, 1919
Cockle, 1907, 1915
Davis 1857
Dickson, 1855.
Elliott, 1904
Espinasse, 1825
Garde, 1830
Gilbert 1756
Gillett, 1897
Glassford, 1820
Gray, 1885
Greenleaf, 1842
Gresley, 1836
Hagan, 1894
Hageman, 1889
Hammon, 1907
Harris, 1892
Harrison, 1825
Hibbert 1912
Holt 1917
Hughes 1906
Hughes, 1917 1921
Indemaur & Thwaites
James 1889
Jelf, 1898
Jones, 1896
Joy, 1842
Kingsford, 1908
Kirkpatrick, 1882.
Lawson, 1886
Lockhart, 1915
Lowndes, 1843
Macklin, 1895
Mac Nally, 1802
Mac Neal, 1914
Maude, 1911
Maurice, 1921
McKelvey, 1907
McKinnon, 1812
Morgan, 1898
Nasmith, 1879
Nelson, 1744
Norton, 1868
Osborn, 1926
Peake, 1801
Phillimore, 1850
Phillips, 1843, 1852, 1908
Phipson, 1892
Powell, 1858, 1910
Ram, 1861
Rapalje, 1887.
Reynolds 1907
Rice 1892
Richardson, 1912
Rogers, 1883
Roscoe, 1827, 1835, 1908
Starkie, 1824
Stephen, 1876, 1922
Straker, *1899*
Swift, 1810
Tait, 1834
Taylor, 1848, 1906, 1920
Thayer, 1892, 1896, 1898
Throckmorten, 1913
Tremecar, 1902
Turner, 1913
Underhill, 1912
Wadelove, 1865
Warner, 1887
Watson, 1917
Wharton, 1877, 1880
Wigmore, *1905, 1913, 1915*
Will, 1896
Williams, 1895
Wills, 1838, 1894, 1907
Wilshere, *1906*
Wood, 1886

(AUTHORS OF WORKS ON THE LAW OF EVIDENCE IN INDIA)

Banerji, 1896
Broughton, 1893
Caspersz, 1893
Cranenburgh, 1913
Cunningham, 1872
Desai, 1908
Eggar, 1915, 1916
Field, 1867
Goodeve, 1862, 1872
Griffiths, 1890
Guide to, 1921
Hukm Chand, 1894
Kamalananda, 1916
Kindersley, 1862
Kinney, 1914
Le Fanu, 1869
Lewis, 1825
Maitra, 1918
Markby, 1897
Mitra (A C) 1895
Mitra and Sircar, 1894
Norton, 1858, 1877
Pals, 1908.
Pillai, 1898.

Pranasankara, 1916
Raha, 1894
Ratanlala, 1919
Sarkar, 1915
Sircar, 1894
Stephen, 1872
Tarapada, 1913
Whitworth, 1875

(C) CLASSIFICATION BY SUBJECTS TREATED OF

NOTE —For the works of the authors, see *the entry given in the Chronological List against the date mentioned in this*

ACCESSORIES AND ACCOMPLICES

Blundell, 1863
Chaudhuri, 1903
Maunsell, 1850

ADVOCACY

Morison, 1895

BURDEN OF PROOF (See *Act I of* 1892, ss 101—111)

Best, 1880
Gulson, 1905
Lawson, 1886
Narasimhachari, 1914
Wigmore, 1913.

CIRCUMSTANTIAL EVIDENCE.

Burrill, 1868
Donogh, 1918
Phillips, 1879.
Will, 1896
Wills, 1838.

COMMENTARIES ON THE INDIAN EVIDENCE ACT (*Act I of* 1872)

Banerji, 1896
Broughton, 1893
Caspersz, 1893
Cunningham, 1872.
Field, 1873, 1894
Goodeve, 1872
Griffiths, 1890
Lewis, 1882
Markby, 1897
Mitra (A C), 1895
Mitra (B K), and Sirkar, 1894.
Norton, 1873
Sarkar, 1894
Stephen, 1872
Whitworth, 1875

COMMUNICATION BY TELEGRAPH

Gray, 1885

CONFESSIONS AND CHALLENGE OF JURORS (See *Act I of* 1872, ss 24—30).

Baddeley (Religions), 1865
Chaudhuri, 1903
Hopwood, 1871.
Joy, 1842.
Monnier, 1907.

Notes.—See also works on *Criminal* Evidence.

CROSS EXAMINATION.

Wellman, 1903.
Wrottesley, 1915.

ESTOPPEL (See *Act I of* 1872, ss 115—117)

Bigelow, 1872
Broughton 1893
Cababé, 1888
Caspersz, 1893
Everest and Strode, 1884
Ewart, 1900
Hukm Chand, 1894

EVIDENCE IN COURTS OF EQUITY.

Gresley, 1836.

EVIDENCE IN CRIMINAL CASES

Allen, 1898
Burrill, 1868.
Cranenburgh, 1913
Jelf, 1898
MacNally, 1802.
Rice, 1892
Roscoe, 1835
Tremear, 1902
Underhill, 1910
Wharton, 1880.

EVIDENCE ON COMMISSION

Hume, Williams & Macklin 1895

EVIDENCE UNDER THE NEW YORK CODE

Warner, 1897

EXPERT AND OPINION EVIDENCE (See *Act I of* 1872, ss 45—51)

Harris, 1892
James, 1889
Lawson, 1886
Rogers, 1883
Stephen, 1863

EXTRINSIC EVIDENCE AS AFFECTING DOCUMENTS

(See *Act I of* 1872, ss 91—100)

Browne, 1893
Wigram, 1831.

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Anonymous, 1735, 1761
Bentham, 1825, 1827
Best, 1849
Bradner, 1898
Dickson, 1855
Garde, 1830
Gilbert, 1756
Glassford, 1820
Greenleaf, 1842
Harrison, 1825
Jones, 1896
Knowles, 1905
M'Kinnon, 1812
Peake 1801
Phillips, 1814
Phipson 1892
Powell, 1856
Ram, 1861
Reynolds 1883
Rice, 1892
Starkie, 1824
Stephen, 1876, 1910
Straker, 1899
Swift, 1810
Tait, 1834
Taylor, 1848
Thayer, 1892, 1896, 1898
Wharton, 1877, 1880
Wigmore, 1904
Wills, 1804
Wood, 1886

HANDWRITING

Carlson, 1914
Hagan, 1894

HEARSAY EVIDENCE

Tregarthen, 1915

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Phillimore, 1850
Poland, 1898

IDENTIFICATION

Harris, 1892
Ram, 1861.

INTERROGATING

Stephen, 1858
Sichel, 1883
Willis, 1916

NISI PRIUS EVIDENCE

Abbott, 1891, 1895
Archbold, 1844
Espinasse, 1825
Peake, 1801
Roscoe, 1827

PRESUMPTIONS (See *Act I of* 1872, ss 79—90, 101—144)

Best, 1844
Burrill, 1868
DeCottyar, 1911.
Lawson, 1886
Mathews, 1827

PRISONERS ON OATH.

Stephen, 1898
Worsley, 186.

PRIVILEGED COMMUNICATIONS (See *Act I of* 1872, ss 121—132)

Hageman, 1889

PROOF.

Osborn, 1926

PSYCHOLOGY APPLIED TO EVIDENCE

Arnold, 1906.

RELEVANCY (See *Act I of* 1872, ss. 5—16)

Whitworth, 1875.

RIGHT TO BEGIN AND REPLY

Best, 1880

RULES OF EVIDENCE

Holt, 1917.
Watson, 1917.

TESTIMONY

Blundell, 1863
Carlson, 1914
Tozer, 1844
Worsley, 1861

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Field, 1867
Goodeve, 1862
Kindersley, 1862
Norton, 1858.

TRIAL EVIDENCE

Abbott, 1918
Ewbank, 1902.
Henry, 1914
Kennedy, 1906
Reynolds, 1912

WITNESSES (See *Act I of* 1872, ss. 118—166).

Best, 1849
Morison, 1895
Ram, 1861
Rapalje, 1887
Reynolds, 1883
Sichel, 1887.
Willis, 1916.
Wrottesley, 1910.

THE

LAW OF EVIDENCE

APPLICABLE TO

BRITISH INDIA

GENERAL INTRODUCTION

PRELIMINARY.

Evidenc branch Adjectiv law.

The substantive law defines the rights, duties and liabilities, the ascertainment of which is the purpose of every judicial proceeding The Criminal branch of that law is contained in the Indian Penal Code, as also in various special and local laws dealing with the subject The substantive Civil law of India has not as yet been codified Generally speaking it is to be found in various Acts of the Indian Legislature, in the English Statutes extending to India and in the personal law of the Hindus and Mussalmans In cases for which no special provision exists, the Courts are enjoined to act according to justice, equity and good conscience Adjective law defines the pleading procedure and proof by which the substantive law is applied in practice It is the machinery by which that law is set and kept in motion The rules relating to pleading and procedure are contained in the Civil and Criminal Procedure Codes Proof, the remaining branch of Adjective law, logically defined, is the sufficient reason for assenting to a proposition as true (1) Practically considered, it is the establishment of facts in issue (ascertained in each particular case by the pleadings and settlement of issues) by proper legal means to the satisfaction of the Court (2) This is done by the production of evidence, the law relating to which is to all legal practice what logic is to all reasoning whatever subject it may be concerned about Accurately speaking, the terms "proof" and "evidence" are distinguished in this that proof is the effect or result of evidence, while evidence is the medium of proof (3) The facts out of which the rights and liabilities arise must be determined correctly Facts which come in question in Courts of Justice are enquired into and determined in precisely the same way as doubtful or disputed facts are enquired into and determined by men in general [illegible] so far as positive law has interposed with rules to secure impartiality [illegible] accuracy of decision or to exclude collateral mischief likely to result fr[illegible] investigation (4) Some portions of the law of Evidence such as th[illegible] deal with the relevancy of facts, are intimately connected with the w[illegible]

(1) Wharton Ev § 1 ; id, Cr Ev, § 2
(2) Best Ev, § 10
(3) Ib
(4) Ib, § 2 Whether all these rules are effective for the p[illegible] were enacted [illegible] course another question

W, LE

of human knowledge and with logic as applied to human conduct (1) Other rules are of a technical character designed to secure the objects mentioned or are based on principles of general policy

ng of Evi " The ambiguity of the word " evidence " has given rise to varying definitions Bentham used it in its broadest sense when he defined it as " any matter of fact the effect, tendency, or design of which is to produce in the mind a persuasion affirmative or disaffirmative of the existence of some other matter of fact "(2) It is, however, clear that the term as used in municipal law must have a very much more limited meaning It is manifest that every fact, some having it may be, but the very slightest bearing on the issue, cannot be adduced Courts are so organized that there must be some limit to the facts which may be given in evidence, as there must be an end of litigation (3) The great bulk, therefore, of the English law of Evidence consists of negative rules declaring what, as the expression runs, " is not evidence "(4) In its legal and most general acceptation, " evidence " has been defined to include all the means, exclusive of mere argument, by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved to the satisfaction of the Court (5) According to the concise definition of the California Code, " Judicial Evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact "(6)

Judicial evidence is thus a species of the genus " evidence ," and is for the most part nothing more than natural evidence, restrained or modified by rules of positive law (7) " A law of evidence properly constructed would be nothing less than an application of the practical experience acquired in Courts of Law to the problem of enquiring into the truth as to controverted questions of fact "(8) The law of evidence (which is contained mainly(9) in Act I of 1872) determines how the parties are to convince the Court of the existence of that state of facts which, according to the provisions of the substantive law, would establish the existence of the right or liability which they allege to exist (10) This law, in so far as it is concerned with what is receivable or not, is founded, in the words of Rolfe, B (11) " on a compound consideration of what, abstractedly considered, is calculated to throw light on the subject in dispute, and of what is practicable Perhaps, if we lived to the age of a thousand years instead of sixty or seventy, it might throw light on any subject that came into dispute, if all matters which could by possibility affect it were severally

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(1) Steph Introd, 1, 2 The same learned author (Dig xi) stated that Chief Baron Gilbert's work on the Law of Evidence (1756), the first of the recognised English text books on the subject, is founded on Locke's Essay, much as his own work is founded on Mill's Logic

(2) Benth, Jud Ev, 17

(3) Bur Jones, Ev, § 1

(4) *Steph Introd* these rules are closely connected with the institution of trial by jury *see* Thayer's Cases on Evidence, 4, and Thayer's Preliminary Treatise on Evidence at the Common Law Part I, Development of Trial by Jury, and *per* Lord Mansfield in the *Berkley Peerage Case*, 4 Camp, 414

(5) 1 Greenleaf, Ev, § 1, Best, Ev, § 11, p 10, Steph Introd, 7, as to the definition of the word *as used in the Act*, see Notes to s 3, *post* *See* also Steph Dig, Art 1 Taylor, Ev, § 1, and the definition given by Prof Thayer in his Cases on *Evidence*, p 2

(6) Cal Code, s 1823 *See* observations on the definitions given in the California Code (which are said to express and typify the judicial sentiment of the American Judiciary) in Rice's General Principles of the Law of Evidence, p 9

(7) Best, Ev, §§ 34 79

(8) Speech in Council of the Hon Mr Stephen, *Gazette of India*, 18th April, 1871, p 42 (Extra Supplement)

(9) Other Acts also contain provisions relating to evidence, as to this see s 2, *post*

(10) Steph Introd, 10

(11) In the *Attorney General v Hitchcock*, 7 Exch, 91, 105

gone into and enquiries carried on from month to month as to the truth of everything connected with it I do not say how that would be, but such a course is found to be impossible at present "(1)

Rules respecting judicial evidence may be generally divided into those relating to the *quid probandum*, or thing to be proved, and those relating to the *modus probandi*, or mode of proving (2) It has been said that there is but one general rule of evidence, the best that the nature of the case will admit (3) This rule does not require the production of the greatest possible *quantity* of evidence, but is framed to prevent the introduction of any evidence which raises the supposition that there is *better* evidence behind, in the possession, or under the control of the party, by which he might prove the same fact The *two chief* applications of this principle are as follows (*a*) With regard to the *quid probandum* the law requires as a condition to the *admissibility* of evidence (either direct or circumstantial) *an open and visible connection* between the principal and evidentiary facts (4) If the belief in the principal fact which is to be ascertained is to be after all, an inference from other facts, those facts must at all events be closely connected with the principal fact in some of certain specific modes (5) This connection must be reasonable and proximate, not conjectural and remote This, which is the theory of relevancy, is dealt with in the first Part of the Evidence Act (6) The first question therefore which the law of evidence should decide is what facts are relevant and may be proved. (*b*) With regard to the *modus probandi*, the law rejects derivative evidence, such as the so-called " hearsay evidence " (7), and exacts original evidence, prescribing that no evidence shall be received which shows on its face, that it only derives its force from some other which is withheld (8) In other words, the *best evidence* must be given If a fact is proved by oral evidence, it must be direct that is to say, things seen must be deposed to by some one who says he saw them with his own eyes things heard by some one who says he heard them with his own ears(9), and original documents must be produced or accounted for before any other evidence can be given of their contents (10) In addition to the above mentioned rules, English text-writers treat as a portion of the law of evidence the rule that the evidence must correspond with the allegations, but it will be sufficient if the substance of the issues be proved. The rights of parties litigating must be determined *secundum allegata et probata* (according to what

What the law of Evidence determines

(1) *See* also *R* v *Parbhudas*, 11 B H C R 91 (1874), *per* West, J " One of the objects of a law of evidence is to restrict the investigations made by Courts within the bounds prescribed by general convenience " As to the utility of the rules, *see* Best, Ev, §§ 35, *et seq*, Field, Ev., 13, *et seq*, sanctions, Best, Ev, §§ 16 *et seq*. securities for insuring veracity and completeness of evidence, *ib*, §§ 54 *et seq*, 100

(2) Best, Ev, § 111, Mr Stephen said in his above mentioned speech of the 18th April 1871 —" The main feature of the Bill consists in the distinction drawn by it *between the relevancy of facts and the mode of proving relevant facts* "

(3) *Per* Lord Hardwicke in *Omychund* v *Barker*, 1 Atk, 21, 49 See *Ramalakshmi* v *Sivanatha*, 14 M I A, 570, 588 (1872), *Bodhnarain* v *Omrao* 13 M I A, 519, 527 (1870), *Gunga Pershad* v *Inderjit*, 23 W R, 390, P C (1875), *Moheema* v *Poorno*, 11 W R, 165, 167 (1869), *Dinomoyi* v *Luchmiput*, 7 I A, 8 As to the meaning of the rule, *see* Norton, Ev, 69, Best, Ev, pp 70 73, 87, 88, 91 93, 96, 215, 216 89, 431, 434, 416, 275, 439, 251, 252, Steph Introd, 3, 7

(4) Best, Ev, §§ 90, 38

(5) *Gazette of India*, 18th April, 1871, *supra*.

(6) v *post*, Introduction to Ch II

(7) *See* Steph Introd., 4, 6, Best, Ev, §§ 495, 112

(8) Best Ev, § 9, *Doe d Welsh* v *Langfield* 16 M & W, 497, *Doe d Gilbert* v *Ross* 7 M & W, 102, 106, *Macdonnel* v *Evans* 11 C B, 930, 942

(9) v ss 59, 60, *post*

(10) v ss 59, 61, 64, *post*.

is averred and proved) This rule has not been incorporated in the Act, as it is one, strictly speaking, rather of the law of procedure proper than of evidence (1)

The law of evidence thus determines —(a) The relevancy of facts(2), or what sort of facts may be proved in order to establish the existence of the right, duty, or liability defined by substantive law (b) The proof of facts(3) that is what sort of proof is to be given of those facts (c) The production of proof of relevant facts(4) that is, who is to give it and how it is to be given and the effect of improper admission or rejection of evidence(5) (*see post*)

The sufficiency of evidence must be distinguished from its competency By competent evidence is meant that which the very nature of the thing to be proved requires as the fit and appropriate proof in the particular case, such as the production of a writing where its contents are the subject of enquiry By satisfactory, or, as it is also called, sufficient, evidence is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt The circumstances which will amount to this degree of proof can never be previously defined, the only legal test of which they are susceptible is their sufficiency to satisfy the mind of an ordinary man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interests (6) The effect of evidence, considered from the point of view of the weight which should be attached to it cannot be regulated by precise rules as the admissibility of evidence may be (7) For these reasons considerations upon the sufficiency of evidence have no place in the Act

Sufficiency of Evidence

The weight of evidence cannot be regulated by precise rules as the admissibility of evidence may be(8) it depends on rules of common sense(9), and the weight of the aggregate of many such pieces of evidence taken together is very much greater than the sum of the weight of each such piece of evidence taken separately (10) The Draft Bill contained the following section, which, though it was not thought necessary to retain it in the Act, must still be borne in mind "when any fact is hereinafter declared to be relevant, it is not intended to indicate in any way the *weight*, if any, which the Court shall attach to it, this being a matter solely for the discretion of the Court" So also the Law Commissioners, in the second paragraph of their Draft Bill, said "Whenever

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(1) *See* cases cited in Field, Ev, 357 369

(2) Evidence Act, Part I, v *post*, s 3, and Introduction to Chapter II

(3) Evidence Act, Part II, v *post* and Introduction to Part II

(4) Evidence Act, Part III, *see* Introduction to this Part, *post*

(5) Steph Introd, II

(6) Greenleaf, Ev, § 2

(7) See *Farquharson* v *Dwarkanath*, 8 B L R, 504, 508 (1871), *Lord Advocate* v *Blantyre*, L R, 4 App Cas, 792, *R* v *Madhub Giri*, 21 W R, Cr, 13 19 (1874), *Townsend* v *Strangroom*, 6 Ves, 333, 334, *O Rorke* v *Bolingbroke*, L R, 2 H L, 837, Best, Ev, § 81

(8) *Farquharson* v *Dwarkanath* 8 B L R, 504, 508 (1871), Best, Ev, § 81

(9) *Lord Advocate* v *Blantyre*, L R, 4 App Cas, 792, *per* Lord Blackburn "For weighing evidence and drawing inferences from it, there can be no canon Each case presents its own peculiarities, and common sense and shrewdness must be brought to bear upon the facts elicited in every case—which a Judge of fact in this country, discharging the functions of a jury in England has to weigh and decide upon' *R* v *Madhub* 21 W R Cr, 13, 19 (1874) 'This inconvenience," says Lord Eldon in *Townsend* v *Strangroom* (6 Ves, 333, 334), 'belongs to the administration of justice that the minds of different men will differ upon the result of the evidence, which may lead to different decisions upon the same case" *See* also remarks of Lord Blackburn in *O Rorke* v *Bolingbroke* L R, 2 H L, 837

(10) *Lord Advocate* v *Blantyre supra*, 792

any evidence is said to be admissible, it is not meant that it is to be regarded as conclusive but only that the weight if any which the deciding authority may consider due shall be allowed to it" In this connection a few dicta of general application may be here cited When one witness deposes to a certain fact having occurred and another witness stating that he was present at the same time denies that any such fact took place greater weight other things being equal is to be attached to the witness alleging the affirmative (1) "Upon general principles affirmative is better than negative evidence A person deposing to a fact which he states he saw must either speak truly, or must have invented his story, or it must be sheer delusion Not so with respect to negative evidence a fact may have taken place in the very sight of a person who may not have observed it and if he did observe may have forgotten it "(2) As a general rule witnesses should be weighed, not numbered (3) More weight should be attached to the evidence given of men's acts than of their alleged words which are so easily mistaken or misrepresented (4) A Judge however, cannot properly weigh evidence who starts with an assumption of the general bad character of the prisoners (5)

Judicial discretion

The Act in many of its sections leaves matters dealt with thereby to the discretion of the Court (6) "Discretion, when applied to a Court of law, means discretion guided by law It must be governed by rule and not by humour It must not be arbitrary vague and fanciful, but legal and regular "(7) "In using a judicial discretion the Courts have to bear in mind not only the Statutes but also the great rules and maxims of the law, such, for example as those of logic or evidence or public policy The right discretion is not *scire quid sit justum* but *scire per legem* as Coke insisted (8) '

The English system

The English system of Judicial evidence is comparatively of very modern date (9) Its progress is marked by the discarding of those restrictions of scholastic jurisprudence which firstly compelled much that was material to be excluded from the issue and then when the issue was thus arbitrarily narrowed shut out much evidence that was relevant and attached to the evidence received certain arbitrary valuations which the Courts were required to apply (10) The progress has as in all cases of legal reform been a slow one (11) But it has been said in England where the traditional theories still possess some strength that artificial rules upon matters of evidence are better avoided as much as possible(12) and that the law now is that with a few exceptions on the ground

(1) *Deby Persad* v *Doolut Singh* 3 M I A 347 357 (1844) Wills Circ Ev 290

(2) The passage in quotation marks is *per* Sir H Jenner in *Chambers* v *The Queen's Proctor* 2 Curt 415 434 *see* also *Williams* v *Hall* 1 Curt 606

(3) *See* notes to s 134 *post*

(4) *Meer* v *Beeby* 1 M I A 42 43 (1836)

(5) *P* v *Kalu Mal* 7 W R Cr 103 (1867) *see* further notes to s 165 *post*

(6) *See* ss 32 33 39 58 60 66 73 86-89 90 114 118 135 136 142 148 150 151 151 156 159 162 164 166

(7) *Per* Lord Mansfield in *Wilkes's case* 4 Burrough's Rep 2539 cited in *Harbans* v *Bhairo* 5 C 259 265 (1879)

(8) *P* v *Chagan* 14 B 331 344 352 *per* Jardine J (1890) Best Ev § 86

(9) Best Ev §§ 109 110 See Phillimore's History and Principles of the Law of Evidence (1850) pp 192 *et seq*

(10) Wharton Ev § 5

(11) See remarks of Lord Coleridge C J in *Blake* v *Albion Life Assurance Co* 4 C P D 109 (1878) In any but an English Court and to the mind of any but an English lawyer the controversy whether this evidence is or is not evidence which a Court of Justice should receive would seem I think supremely ridiculous because every one would say that the evidence was most cogent and material to the plaintiff's claim'

(12) *Per* Wills J in *Hennessy* v *Wright* L. R , 21 Q B D 518 (1888).

of public policy, all which can throw light on the disputed transaction is admissible (1) The Evidence Act may be regarded as being itself an application of these principles "Under the Evidence Act admissibility is the rule and exclusion the exception, and circumstances which under other systems might operate to exclude are, under the Act, to be taken into consideration only in judging of the value to be allowed to evidence when admitted "(2) Accordingly, where a Judge is in doubt as to the admissibility of a particular piece of evidence he should declare in favour of admissibility rather than of non-admissibility (3) The principle of exclusion enacted by the fifth section of this Act should not be so applied as to shut out matters which may be essential for the ascertainment of truth (4) The Privy Council in *Ameeroonissa Khatoon* v *Abedoonissa Khatoon*(5) said "Objections made with the view of excluding evidence are not received with much favour at this Board" But it must not be assumed either that all technical rules are unnecessary, or that all the rules of evidence are technical It may be safely asserted that the enforcement of most of such technical rules as are contained in this Act is necessary, and that many other rules possess no element of technicality whatever Thus as the Judicial Committee have also observed "It is a cardinal rule of evidence, not one of technicality but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents "(6) And other instances might be adduced than those covered by what is technically known as "the best evidence" rule The Act would have been better had it not attempted to define what is Evidence and had limited itself to a declaration of what is not admissible In that case all that was probative would go in without discussion unless the objector could show that it was forbidden by the provisions of the Act

History of the law of evidence in this country.

The English rules of evidence were always followed in the Courts established by Royal Charter in the Presidency Towns of Calcutta, Madras and Bombay Such of these rules as were contained in the Common and Statute law which prevailed in England before 1726, were introduced by the Charter of that year, some others were rules to be found in subsequent Statutes expressly extended to India, while others, again, had no greater authority than that of use and custom (7) In the Courts outside the Presidency Towns no complete rules of evidence were ever laid down or introduced by authority (8) The law on this subject rested in a state of great indefiniteness In the Full Bench decision of the Calcutta High Court in the case of the

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(1) *Per* Lord Coleridge C J, in *Blake* v *Albion Life Assurance Co*, L R, 4 C P D 109 (1878) adding —"Not of course matters of mere prejudice nor anything open to real moral or sensible objection but all things which fairly throw light on the case "

(2) *R* v *Mona*, 16 B 661, 668 (1892), *per* Jardine J citing Romesh Chunder Mitter and Field JJ, and *see* cases cited *post*

(3) *The Collector* v *Palakdhari* 12 A, 26 (1889)

(4) *R* v *Abdullah*, 7 A, 40 (1885), *see* observations of the Hon Mr Maine in moving the reference of the Evidence Bill to Committee "Anything like a capricious administration of the law of evidence was an evil, but it would be an equal, or perhaps even a greater evil that such strict rules of evidence should be enforced as practically to leave the Court without the materials for a decision "

(5) 23 W R, 208, 209, P C (1875)

(6) *Dinomoyi* v *Roy*, 7 I A, 8, 15 (1879)

(7) Field Ev, 15, Whitley Stokes Anglo Indian Codes, Vol II, 812 *See* Report of Law Commissioners, *Appendix*

(8) Regulations made between 1793 and 1834 contained a few rules others were derived from a vague customary law of evidence, partly drawn from the Hedaya and the Mahommedan Law Officers, others from English text books, Whitley Stokes II, 812, 813, and *see* Act XIX of 1853

Queen v. *Khyroolah*(1) decided in 1866, it was held that the English law of evidence was not the law of the Mofussil, that at that time the Mahommedan criminal law, including the Mahommedan law of evidence, was no longer the law of the country, and that by the abolition of the Mahommedan law, *the law of England was not established in its place The Mofussil Courts were* thus not required to follow the English law, although they were not debarred from following it where they regarded it as the most equitable

The first Act of the Governor General in Council which dealt with evidence, strictly so-called, was Act X of 1835, which applied to all the Courts in British India and dealt with the proof of Acts of the Governor General in Council (2) This was followed by eleven enactments passed at intervals during the next twenty years which effected various small amendments of the law and applied to the Courts in India several of the reforms in the law of evidence made in England (3) In 1855, an Act was passed(4) for the further improvement of the law of evidence, which contained many provisions applicable to all Courts in British India (5) These provisions were repealed and re-enacted with certain modifications and alterations by the present Act While, therefore, within the Presidency Towns the English law of evidence was in force, modified by certain Acts of the Indian Legislature, of which Act II of 1855 was the most important, the Mofussil Courts, on the other hand, had down to 1872, hardly any fixed rules of evidence save those contained in Acts XIX of 1853 and II of 1855 (6) Before and even for some time after 1872 the lax character of the *evidence in the Mofussil Courts was the subject of frequent judicial comment* (7) To remedy this unsatisfactory(8) state of the law a Draft Bill was drawn up by Her Majesty's Commissioners and introduced by Sir Henry Sumner Maine, then the Legal Member in Council This first Draft Bill did not, however, meet with approval A new Bill was therefore prepared by Sir James Fitzjames Stephen which was ultimately passed as Act I of 1872 (The Indian Evidence Act) This Act is based on the English law of evidence modified to suit India (9)

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(1) B L R, Sup Vol App 11, s c, 6 W R, Cr, 21, Field, Ev, 16 18, Whitley Stokes, *supra*, and see *R* v *Ramswami*, 6 B H C R, Cr, 49 (1869)

(2) Whitley Stokes II, 813

(3) *Ib*, Act XIX of 1837 (abolished incompetency by reason of conviction), Act V of 1840 (affirmations), *see* also Acts XVIII of 1863, s 9, VI of 1872 X of 1873, Acts IX of 1840 VII of 1844 (incompetency by reasons of crime or interest), XV of 1852 (competency of parties and other matters), Act XIX of 1853 extended several of these reforms to the Civil Courts of the East India Company in the Bengal Presidency

(4) Act II of 1855 As to this Act, see *R* v *Gopal Dass*, 3 M, 271, 282

(5) *The following Acts were subsequent*ly passed X of 1855 (Attendance of Witnesses), VIII of 1859 (Civil Procedure, contained like the present Code provisions as to witnesses), XXV of 1861 (*Criminal Procedure*, contained provisions as to witnesses, confessions, police diaries examination of accused and Civil Surgeon, reports of Chemical officers, and dying declarations, which have been re enacted in the present Act or in the present Code) XV *of 1869 (evidence of prisoners)*, *see* Whitley Stokes, 817

(6) Whitley Stokes, 817, Field, Ev, 17, 18, 19 *See* Report of Law Commissioners

(7) See observations in *Unide* v *Pemmasamy* 7 M I A, 128, 137 (1858), *Hureehur* v *Majhee* 22 W R 355 356 357 (1874), *Naragunty* v *Vengama* 9 M I A, 90 (1861), *Gujju* v *Fatteh*, 6 C, 193 (1880).

Even as late as 1881, Stuart, C J, had cause to complain *Phul* v *Surjan*, 4 A, 249, 250

(8) *See* remarks of Privy Council in *Bunwaree* v *Hetnarain* 7 M I A, 148 158 (1858), *Unide* v *Pemmasamy*, 7 M I A, 128, 137 (1858), *Ajoodhya* v *Omrao*, 13 M I A, 519 (1870)

(9) Report of Select Committee "It is little more than an attempt to reduce the English law of evidence to the form of

of public policy, all which can throw light on the disputed transaction is admissible (1) The Evidence Act may be regarded as being itself an application of these principles "Under the Evidence Act admissibility is the rule and exclusion the exception, and circumstances which under other systems might operate to exclude, are, under the Act, to be taken into consideration only in judging of the value to be allowed to evidence when admitted "(2) Accordingly, where a Judge is in doubt as to the admissibility of a particular piece of evidence, he should declare in favour of admissibility rather than of non-admissibility (3) The principle of exclusion enacted by the fifth section of this Act should not be so applied as to shut out matters which may be essential for the ascertainment of truth (4) The Privy Council in *Ameeroonissa Khatoon* v *Abedoonissa Khatoon*(5) said "Objections made with the view of excluding evidence are not received with much favour at this Board" But it must not be assumed either that all technical rules are unnecessary, or that all the rules of evidence are technical It may be safely asserted that the enforcement of most of such technical rules as are contained in this Act is necessary, and that many other rules possess no element of technicality whatever Thus as the Judicial Committee have also observed "It is a cardinal rule of evidence, not one of technicality but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents "(6) And other instances might be adduced than those covered by what is technically known as "the best evidence" rule The Act would have been better had it not attempted to define what is Evidence and had limited itself to a declaration of what is not admissible In that case all that was probative would go in without discussion unless the objector could show that it was forbidden by the provisions of the Act

History of the law of evidence in this country.

The English rules of evidence were always followed in the Courts established by Royal Charter in the Presidency Towns of Calcutta, Madras and Bombay Such of these rules as were contained in the Common and Statute law which prevailed in England before 1726, were introduced by the Charter of that year, some others were rules to be found in subsequent Statutes expressly extended to India, while others, again, had no greater authority than that of use and custom (7) In the Courts outside the Presidency Towns no complete rules of evidence were ever laid down or introduced by authority (8) The law on this subject rested in a state of great indefiniteness In the Full Bench decision of the Calcutta High Court in the case of the

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(1) *Per* Lord Coleridge C J, in *Blake* v *Albion Life Assurance Co*, L R, 4 C P D 109 (1878) adding —"Not of course matters of mere prejudice nor anything open to real moral or sensible objection but all things which fairly throw light on the case"

(2) *R* v *Mona*, 16 B 661 668 (1892); *per* Jardine J citing Romesh Chunder Mitter and Field JJ, and *see* cases cited *post*

(3) *The Collector* v *Palakdhari*, 12 A., 26 (1889)

(4) *R* v *Abdullah* 7 A, 40 (1885), *see* observations of the Hon Mr Maine in moving the reference of the Evidence Bill to Committee "Anything like a capricious administration of the law of evidence was an evil, but it would be an equal, or perhaps even a greater evil, that such strict rules of evidence should be enforced as practically to leave the Court without the materials for a decision"

(5) 23 W R, 208, 209 P C (1875)

(6) *Dinomoyi* v *Roy*, 7 I A, 8, 15 (1879)

(7) Field Ev, 15, Whitley Stokes, Anglo Indian Codes, Vol II, 812 *See* Report of Law Commissioners, *Appendix*

(8) Regulations made between 1793 and 1834 contained a few rules others were derived from a vague customary law of evidence, partly drawn from the Hedaya and the Mahommedan Law Officers, others from English text books, Whitley Stokes, II, 812, 813, and *see* Act XIX of 1853

Queen v *Khyroolah*(1) decided in 1866, it was held that the English law of evidence was not the law of the Mofussil that at that time the Mahommedan criminal law including the Mahommedan law of evidence was no longer the law of the country and that by the abolition of the Mahommedan law the law of England was not established in its place The Mofussil Courts were thus not required to follow the English law although they were not debarred from following it where they regarded it as the most equitable

The first Act of the Governor General in Council which dealt with evidence, strictly so called was Act X of 1835 which applied to all the Courts in British India and dealt with the proof of Acts of the Governor-General in Council (2) This was followed by eleven enactments passed at intervals during the next twenty years which effected various small amendments of the law and applied to the Courts in India several of the reforms in the law of evidence made in England.(3) *In 1855, an Act was passed(4) for the further improvement of* the law of evidence which contained many provisions applicable to all Courts in British India (5) These provisions were repealed and re-enacted with certain modifications and alterations by the present Act While, therefore, within the Presidency Towns the English law of evidence was in force, modified by certain Acts of the Indian Legislature, of which Act II of 1855 was the most important the Mofussil Courts on the other hand, had down to 1872, hardly any fixed rules of evidence save those contained in Acts XIX of 1853 and II of 1855 (6) Before and even for some time after 1872 the lax character of the evidence *in the Mofussil Courts was the subject of frequent judicial comment* (7) To remedy this unsatisfactory(8) state of the law a Draft Bill was drawn up by Her Majesty's Commissioners and introduced by Sir Henry Sumner Maine, then the Legal Member in Council This first Draft Bill did not, however, meet with approval A new Bill was therefore prepared by Sir James Fitzjames Stephen which was ultimately passed as Act I of 1872 (The Indian Evidence Act) This Act is based on the English law of evidence modified to suit India (9)

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(1) B L R, Sup Vol App 11, s c, 6 W R, Cr 21 Field, Ev 16 18, Whitley Stokes, *supra* and see *R* v *Pamswami* 6 B H C R, Cr, 49 (1869)

(2) Whitley Stokes, II, 813

(3) *Ib* Act XIX of 1837 (abolished incompetency by reason of conviction); Act V of 1840 (affirmations), *see* also Acts XVIII of 1863, s 9, VI of 1872, X of 1873 Acts IX of 1840, VII of 1844 (incompetency by reasons of crime or interest), XV of 1852 (competency of parties and other matters), Act XIX of 1853 extended several of these reforms to the Civil Courts of the East India Company in the Bengal Presidency

(4) Act II of 1855 As to this Act, see *R* v *Gopal Dass*, 3 M, 271, 282

(5) The following Acts were subsequently passed X of 1855 (Attendance of Witnesses), VIII of 1859 (Civil Procedure, contained like the present Code provisions as to witnesses), XXV of 1861 (*Criminal Procedure, contained provisions* as to witnesses, confessions, police diaries examination of accused and Civil Surgeon, reports of Chemical officers, and dying declarations, which have been re-enacted in the present Act or in the present Code), XV of 1869 (evidence of prisoners), *see* Whitley Stokes 817

(6) Whitley Stokes 817, Field, Ev, 17, 18 19 *See* Report of Law Commissioners

(7) *See* observations in *Unide* v *Pemmasamy*, 7 M I A., 128 137 (1858), *[illegible]* v *Majhee*, 22 W R 355 356, 357 ([illegible]), *Niraguntj* v *Vengama*, 9 M I A [illegible] (1861), *Gujju* v *Fatteh*, 6 C, 1[illegible] ([illegible]) Even as late as 1881, [illegible] had cause to complain *Phul* v *[illegible]* [illegible], 249, 250

(8) *See* remarks of [illegible] *Bunwaree* v *Hetnarain*, 7 [illegible], 158 (1858), *Unide* v *Pemmasamy* 7 M I A, 128, 137 (1858), *[illegible]* v *[illegible]* 13 M I A, 519 (1870)

(9) Report of [illegible] "It is little more than an attempt to reduce the English law of evidence to the form of [illegible]

It is in the main in accordance with English law though, as will be seen on a reference to the Commentary, it does in several respects materially diverge from that law (1) Together with certain Acts saved by(2), or enacted subsequent to it, this Act contains the law on the subject of evidence now in force in British India (3)

It has been said that with some few exceptions the Indian Evidence Act was intended to, and did, in fact, consolidate the English law of evidence(4); that the Act itself is little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India(5), and that it was drawn up chiefly from Taylor on Evidence (6) It is true that although the Code is, in the main, drawn on the lines of the English law of evidence there is no reason to suppose that it was intended to be a servile copy of it(7), and indeed, as already stated, it does in certain respects differ from English law Moreover, these dicta do not recognise the undoubted original character of sections (5-16) dealing with the relevancy of facts

Although as all rules of evidence which were in force at the passing of the Act are repealed the English decisions cannot be regarded as binding authorities, they may still serve as valuable guides; though of course English authorities upon the meaning of particular words are of little or no assistance when those words are very different from the ones to be considered (8)

Even where a matter has been expressly provided for by the Act, recourse may be had to English or American decisions if, as is not infrequently the case, the particular provision be of doubtful import owing to the obscurity or incompleteness of the language in which it has been enacted Authority abounds for the use of the extraneous sources to which reference has been made in cases

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express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India' Steph Introd, 2 The differences between the Indian and English law will be found hereafter noted in the Commentary to the sections *see* also Whitley Stokes, p 827, Vol II, and Wilson's Comparative Tables of English and Indian Law, 1890, p 14 As however pointed out later, fundamental distinctions exist in the mode of treatment between English and Indian law

(1) See last note and *Ranchoddas* v *Bapu*, 10 B, 433, 442 (1886); *Collector* v *Palakdhari* 12 A, 1, 37 (1889), *R* v *Abdullah*, 7 A, 400, 401

(2) S 2, *post*

(3) *See* note to s 2, *post*

(4) *Gujju* v *Fatteh*, 6 C, 171, 188 (1880), *per* Garth, C J

(5) *Smith* v *Ludha*, 17 B, 129, 141 (1892), *per* Bayley, C J, adopting the words of Sir James F Stephen, Introd, Ev Act, 2

(6) *Muncherslaw* v *New Dhurmsey*, 4 B, 576 581 (1880) *per* West, J *see* remarks of Jackson J in *R* v *Ashootosh* supra, 491, Taylor on Ev referred to in *R* v *Pyari*, 4 C L R, 508, 509, *Gujju* v *Fatteh*, 6 C, 179, *R* v *Rami*, 3 M, 52 *R* v *Rama*, 3 B, 17 (1878), *R* v *Fakirapa*, 15 B, 502 (1890), *Framji* v *Mohansingh*, 18 B, 279 (1893), and numerous other cases. Mr Norton, however, at p iv of the Preface to his Edition of the Act, says that in his opinion it is a mere figure of speech to assert that the 167 sections of the Act contain all that is applicable in India of the two volumes of Taylor on Evidence and that a great mass of the principles and rules which Mr Taylor's work contains will have to be written back between the lines of the Code

(7) *Ranchoddas* v *Bapu*, 10 B, 439, 442 (1886) *per* Sargent, C J; see *The Collector* v *Palakdhari*, 12 A, 1, 37 (1889), *R* v *Abdullah* 7 A, 400, 401 (1885)

(8) Re *Pyari* 4 C L R, 508, 509; *R* v *Ghulet*, 7 A, 44 (1884), English cases irrelevant when Indian Legislature has not followed English law.

such as these (1) As was observed by Edge, C J, in *The Collector of Gorakhpur v. Palakdhari Singh*(2) "No doubt cases frequently occur in India in which considerable assistance is derived from the consideration of the law of England and of other countries. In such cases we have to see how far such law was founded on common sense and on the principles of justice between man and man and may safely afford guidance to us here"

It must not, however, be forgotten that the Indian Evidence Act is a Code which not only defines and amends but also consolidates the Law of Evidence, repealing all rules other than those saved by the last portion of its second section (3) The method of construction to be adopted in the case of such a Code has been expounded by Lord Herschell(4) in terms which have been adopted by the Privy Council(5) and cited and applied in other cases in this country (6)

A similar rule had been previously laid down in this country with reference to the construction of this Act In the case of the *R* v *Ashootosh Chuckerbutty*(7) it was said "Instead of assuming the English Law of Evidence, and then inquiring what changes the Evidence Act has made in it, the Act should be regarded as containing the scheme of the law the principles and the application of these principles to the cases of most frequent occurrence, but in respect of matters expressly provided for in the Act we must so to speak, start from the Act and not deal with it as a mere modification of the law of evidence prevailing in England"

Questions however, may arise as regards matters not expressly provided for in the Act It has been held that the second section in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself(8) and that a person tendering evidence must show that it is admissible under some one or other of the provisions of this Act (9) It is to be regretted that the Act was not so framed as to admit other rules of evidence on points

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(1) See *P* v *Kajiram* 16 B, 433 (1892), *Pershad* v *Ram Pertab*, 22 C, 8 (1894) and the cases cited, *post*

(2) 12 A 11 19 (1889), and *see* also remarks of Straight J at pp 19 20 *ib*, *Framji* v *Mohun*, 18 B, 280 (1893) [reference to American Case law], *R* v Elahi B L R Sup Vol, F B, 459 (1866) [English, American and Scotch Law], 5 W R, Cr, 59, [Best, Ev, Gilbert on Ev, Chitty's Criminal law], 7 W R, 338 F B [Civil law Austin, Jur, Goodeve Ev], 11 W R, Cr, 21 [Roscoe, Ev], *R* v *Hedger*, (1852), p 132 (Starkie on Ev), and p 141 (Paley), 1 B, 475, 11 B H C, 93 [Russell on Crimes], 14 B 335 [Phillips Ev] 4 B, 581 [Gresley on Ev], B L R, F B, Sup Vol, 422 [Norton on Ev], and other cases too numerous to mention Concerning the weight to be given to American decisions *see* remarks of Cockburn, L C J, in *Scaramanga* v *Stamp* 5 C P D, 295 303

(3) *The Collector* v *Palakdhari*, 12 A, 35 (1889), and see *post*

(4) In *Bank of England* v *Vagliano Brothers*, L R, App Cas (1891) 107 (at pp 144, 145)

(5) In *Norendra* v *Kamalbasini* 23 I A, 18 26 (1896)

(6) *Daglu* v *Panchom* 17 B, 382 (1892), *Damodara* v *The Secretary of State*, 18 M, 91 (1894) *Kondayya* v *Narasimhulu*, 20 M, 103 (1896), *Lala* v *Golab*, 23 C, 517 (1901) This subject will be found fully discussed in the Author's Civil Procedure Code Second Edition

(7) 4 C, 941 (1878), *per* Jackson J

(8) *R* v *Abdullah*, 7 A, 385, 399 (1885), *Muhammad* v *Muhammad*, 10 A, 325 (1886), *R* v *Pitamber Jina* 2 B, 64 (1876) and in next note

(9) *Lekhraj* v *Mahpal*, 7 I A, 70 (1879); *Collector* v *Palakdhari*, 12 A, 11, 12, 19, 20, 34, 35 43 (1889) And see last note: Though in *R* v *Ashootosh* 4 C, 491 (1878) it was said that where a case arises *for* which no positive solution can be found in the Act itself, recourse may be had to the English rules if any on the point

not specifically dealt with by it as was in effect done by the Commissioners in the second section of their Draft In that case whenever omissions occur (and some do in fact occur) in the Act recourse might be had to the present or previous law on the point existing in England or the previous rules if any, in this country.

CHAPTER I.*

General distribution of the subject

Almost every branch of law is composed of rules of which some are grounded upon practical convenience and the experience of actual litigation whilst others are closely connected with the constitution of human nature and society Thus the criminal law contains many provisions of no general interest, such as those which relate to the various forms in which dishonest persons tamper with or imitate coin but it also contains provisions, such as those which relate to the effect of madness on responsibility which depend on several of the most interesting branches of moral and physical learning This is perhaps more conspicuously true of the law of evidence than of any other branch of the law Many of its provisions however useful and necessary, are technical and the enactments in which they are contained can claim no other merit than those of completeness and perspicuity The whole subject of documentary evidence is [2]† of this nature Other branches of the subject, such as the relevancy of facts are intimately connected with the whole theory of human knowledge and with logic as applied to human conduct The object of this introduction is to illustrate these parts of the subject by stating the theory on which they depend and on which the provisions of the Act proceed As to more technical matters the Act speaks for itself and I have nothing to add to its content Technical and general elements of law

The Indian Evidence Act is little more than an attempt to reduce the English law of Evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India Relation of Evidence Act to English law of evidence

Like almost every other part of English law, the English law of evidence was formed by degrees No part of the law has been left so entirely to the discretion of successive generations of judges The Legislature till very recently interfered but little with the matter, and since it began to interfere it has done so principally by repealing particular rules, such as that which related to the disqualification of witnesses by interest, and that which excluded the testimony of the parties but it has not attempted to deal with the main principle of the subject English law of evidence

It is natural that a body of law thus formed by degrees and with reference to particular cases, should be destitute of arrangement and in particular that its leading terms should never have [3] been defined by authority, that general rules should have been laid down with reference rather to particular circumstances than to general principles and that it should have been found necessary to qualify them by exceptions inconsistent with the principles on which they proceed Its want of arrangement

When this confusion had once been introduced into the subject it was hardly capable of being remedied either by Courts of Law, or by writers of Difficulties of amending it

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* This and the *following chapters down to p 78 are Sir James Fitzjames Stephen's* introduction to the Evidence Act

† This and the following numbers indicate the paging of the original book (Ed 1893) as referred to in this commentary

text books The Courts of Law could only decide the cases which came before them according to the rules in force The writers of text books could only collect the results of such decisions The Legislature might no doubt have remedied the evil but comprehensive legislation upon abstract questions of law has never yet been attempted by Parliament in any one instance though it has in several well known cases been attended with signal success in India

Fundamental rules of English law of evidence

That part of the English law of evidence which professes to be founded upon anything in the nature of a theory on the subject may be reduced to the following rules —

(1) Evidence must be confined to the matters in issue

(2) Hearsay evidence is not to be admitted

(3) In all cases the best evidence must be given

Each of these rules is very loosely expressed The word ' evidence which is the leading term of each is undefined and ambiguous

It sometimes means the words uttered and things exhibited by witnesses before a court of justice

[4] At other times it means the facts proved to exist by those words or things and regarded as the groundwork of inferences as to other facts not so proved

Again it is sometimes used as meaning to assert that a particular fact is relevant to the matter under inquiry

The word ' issue is ambiguous In many cases it is used with reference to the strict rules of English special pleading the main object of which is to define with great accuracy the precise matter which is affirmed by the one party to a suit and denied by the other

In other cases it is used as embracing generally the whole subject under inquiry

Again the word ' hearsay ' is used in various senses Sometimes it means whatever a person is heard to say, sometimes it means whatever a person declares on information given by some one else sometimes it is treated as being nearly synonymous with ' irrelevant '

Ambiguity of rule as to confining evidence to issue

If the rule that evidence must be confined to the matters in issue were constructed strictly it would run thus ' No witness shall ever depose to any fact except those facts which by the form of the pleadings are affirmed on the one side and denied on the other ' So understood the rule would obviously put a stop to the whole administration of justice as it would exclude evidence of decisive facts

A sues *B* on a promissory note *B* denies that he made the note

A has a letter from *B* in which he admits that he made the note and promises to pay it This admission could [5] not be proved if the rule referred to were constructed strictly, because the issue is whether *B* made the note and not whether he admitted having made it

This absurd result is avoided by using the word evidence ' as meaning not testimony but any fact from which any other fact may be inferred Thus interpreted the rule that evidence must be confined to matters in issue will run thus ' No facts may be proved to exist except facts in issue or facts from which the existence of the facts in issue can be inferred ', but if the rule is thus interpreted, it becomes so vague as to be of little use for the question naturally arises from what sort of facts may the existence of other facts be inferred ? To this question the law of England gives no explicit answer at all though partial and confused answers to parts of it may be inferred from some of the exceptions to the rules which exclude hearsay

For instance there are cases from which it may be inferred that evidence may sometimes be given of a fact from which another fact may be inferred, although the fact upon which the inference is to be founded is a crime, and *although the fact to be inferred is also a crime for which the person against whom the evidence is to be given is on his trial*

The full answer to the question 'what facts are relevant,' which is the most important of all the questions that can be asked about the law of evidence has thus to be learnt partly by experience, and partly by collecting together such crooked and narrow illustrations of it as the one just given

[6] The rule that 'hearsay is no evidence' is vague to the last degree as each of the meanings of which the word 'hearsay' is susceptible is sometimes treated as the true one As the rule is nowhere laid down in an authoritative *manner its meaning has to be collected from the exceptions to it, and these* exceptions of which there are as many as twelve or thirteen, imply at least three different meanings of the word 'hearsay' Ambiguity of the rule excluding hearsay

Thus it is a rule that evidence may be given of statements which accompany and explain relevant actions As no rule determines what actions are relevant this is in itself unsatisfactory, but as the rule is treated as an exception to the rule excluding hearsay, it implies that 'hearsay' means that which a man is heard to say If this is the meaning of hearsay, the rule which excludes it would run thus 'No witness shall ever be allowed to depose anything which he has heard said by any one else' The result of this would be that no verbal contract could ever be proved, and that no one could ever be convicted of using threats with intent to extort money, or of defamation by words spoken except in virtue of exceptions which stultify the rule

Most of the exceptions indicate that the meaning of the word 'hearsay' is that which a person reports on the information of some one else, and not upon the evidence of his own senses This, with certain exceptions, is no doubt a valuable rule but it is not the natural meaning of the words 'hearsay is no evidence' and it is in [7] practice almost impossible to divest words of their natural meaning

The rule that documents which support ancient possession may be admitted as between persons who are not parties to them, is treated as an exception to the rule excluding hearsay This implies that the word 'hearsay' is nearly, if not quite equivalent to the word 'irrelevant' But the English law contains nothing which approaches to a definition of relevancy

The rule which requires that the best evidence of which a fact is susceptible should be given is the most distinct of the three rules referred to above, and it is certainly one of the most useful It is simply an amplification of the obvious maxim that if a man wishes to know all that he can know about a matter his own senses are to him the highest possible authority If a hundred witnesses of unimpeachable character were all to swear to the contents of a sealed letter, and if the person who heard them swear opened the letter and found that its contents were different, he would conclude, without the intervention of any conscious process of reasoning at all, that they had sworn what was not true Rules as to best evidence

The ambiguity of the word 'evidence' is the cause of a great deal of obscurity apart from that which it gives to the rules above mentioned In scientific inquiries, and for popular and general purposes, it is no doubt convenient to have one word which includes — Ambiguity of the word 'evidence

(1) the testimony on which a given fact is believed,
[8] (2) the facts so believed, and
(3) the arguments founded upon them

For instance in the title of "Paley's Evidences of Christianity," the word is used in this sense The nature of the work was not such as to give much

importance to the distinction which the word overlooks So in scientific inquiries, it is seldom necessary (for reasons to which I shall have occasion to refer hereafter) to lay stress upon the difference between the testimony on which a fact is believed, and the fact itself In judicial inquiries, however, the distinction is most important, and the neglect to observe it has thrown the whole subject into confusion by causing English lawyers to overlook the leading distinction which ought to form the principle on which the whole law should be classified I mean the distinction between the relevancy of facts and the mode of proving relevant facts

Effects of this ambiguity.

The use of the one name ' evidence ' for the fact to be proved and the means by which it is to be proved 'has given a double meaning to every phrase in which the word occurs ' Thus, for instance, the phrase ' primary evidence ' sometimes means a relevant fact, and sometimes the original of a document as opposed to a copy ' Circumstantial evidence ' is opposed to ' direct evidence ' But ' circumstantial evidence ' usually means a fact, from which some other fact is inferred, whereas ' direct evidence ' means testimony given by a man as to what he has himself perceived by his own senses It would thus be correct to say that circumstantial evidence [9] must be proved by direct evidence—a clumsy mode of expression which is in itself a mark of confusion of thought The evil, however, goes beyond mere clumsiness of expression People have naturally enough supposed that circumstantial and direct evidence admit of being contrasted in respect of their cogency, and that different canons can be laid down, as to the conditions which they ought to satisfy before the Court is convinced by them This, I think, confuses the theory of proof and is an error due entirely to the ambiguity of the word ' evidence '

Merits of English law of evidence

It would be a mistake to infer from the unsystematic character and absence of arrangement which belongs to the English law of evidence that the substance of the law itself is bad On the contrary, it possesses in the highest degree the characteristic merits of English case law English case law as it is is to what it ought to be and might be, if it were properly arranged what the ordinary conversation of a very clever man on all sorts of subjects written down as he uttered it, and as passing circumstances furnished him with a text would be to the matured and systematic statement of his deliberate opinions It is full of the most vigorous sense, and is the result of great sagacity applied to past and varied experience

Natural distribution of the subject

The manner in which the law of evidence is related to the general theories which give it its interest can be understood only by reference [10] to the natural distribution of the subject, which appears to be as follows —

All rights and liabilities are dependent upon and arise out of facts

Every judicial proceeding whatever has for its purpose the ascertaining some right or liability If the proceeding is Criminal the object is to ascertain the liability to punishment of the person accused If the proceeding is Civil, the object is to ascertain some right of property or of status or the right of one party, and the liability of the other, to some form of relief

In order to effect this result, provision must be made by law for the following objects —*First*, the legal effect of particular classes of facts in establishing rights and liabilities must be determined This is the province of what has been called substantive law *Secondly*, a course of procedure must be laid down by which persons interested may apply the substantive law to particular cases The law of procedure includes, amongst others, two main branches (1) the law of pleading, which determines what in particular cases are the questions in dispute between the parties, and (2) the law of evidence, which determines how the parties are to convince the Court of the existence of that state of facts which, according to the provisions of substantive law, would establish the existence of the right or liability which they allege to exist.

The following is a simple illustration *A* sues *B* on a bond for Rs 1 000 *B* says that the execution of the bond was procured by coercion Illustration

[11] The substantive law is that a bond executed under coercion cannot be enforced

The law of procedure lays down the method according to which *A* is to establish his right to the payment of the sum secured by the bond One of its provisions determines the manner in which the question between the parties is to be stated

The question stated under that provision is whether the execution of the bond was procured by coercion

The law of evidence determines—

(1) What sort of facts may be proved in order to establish the existence of that which is defined by the substantive law as coercion ?

(2) What sort of proof is to be given of those facts ?

(3) Who is to give it ?

(4) How it is to be given ?

Thus before the law of evidence can be understood or applied to any particular case it is necessary to know so much of the substantive law as determines what under given states of facts would be the rights of the parties and so much of the law of procedure as is sufficient to determine what questions it is open to them to raise in the particular proceeding

Thus in general terms the law of evidence consists of provisions upon the following subjects —

(1) The relevancy of facts

(2) The proof of facts

(3) The production of proof of relevant facts

The foregoing observations show that this account of [12] the matter is exhaustive For if we assume that a fact is known to be relevant and that its existence is duly proved the Court is in a position to go on to say how it affects the existence nature or extent of the right or liability, the ascertainment of which is the ultimate object of the inquiry and this is all that the Court has to do

The matter must however be carried further The three general heads may be distributed more particularly as follows —

I *The Relevancy of Facts* —Facts may be related to rights and liabilities in one of two ways — Relevancy of Facts

(1) They may by themselves or in connection with other facts constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact that *A* is the eldest son of *B*, there arises of necessity the inference that *A* is by the law of England the heir at law of *B* and that he has such rights as that status involves From the fact that *A* caused the death of *B* under certain circumstances and with a certain intention or knowledge there arises of necessity the inference that *A* murdered *B* and is liable to the punishment provided by law for murder 1 Facts in issue

Facts thus related to a proceeding may be called facts in issue unless their existence is undisputed

(2) Facts which are not themselves in issue in the sense above explained may affect the [13] probability of the existence of facts in issue and be used as the foundation of inferences respecting them, such facts are described in the Evidence Act as relevant facts 2 Relevant facts

All the facts with which it can in any event be necessary for Courts of Justice to concern themselves are included in these two classes.

The first great question, therefore, which the law of evidence, should decide is, what facts are relevant The answer to this question is to be learnt from the general theory of judicial evidence explained in the following chapter

What facts are in issue in particular cases is a question to be determined by the substantive law, or in some instances by that branch of the law of procedure which regulates the forms of pleading, Civil or Criminal

Proof of relevant facts

II *The Proof of Relevant Facts*—Whether an alleged fact is a fact in issue or a relevant fact, the Court can draw no inference from its existence till it believes it to exist, and it is obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined The question is whether *A* wrote a letter The letter may have contained the terms of a contract It may have been a libel It may have constituted the motive for the commission of a crime by *B* It may supply proof of an *alibi* in favour of *A* It may be an admission or a [14] confession of crime, but whatever may be the relation of the fact to the proceeding, the Court cannot act upon it unless it believes that *A* did write the letter, and that belief must obviously be produced, in each of the cases mentioned, by the same or similar means If the Court requires the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceeding

1 Judicial notice
2 Oral evidence
3 Documentary evidence

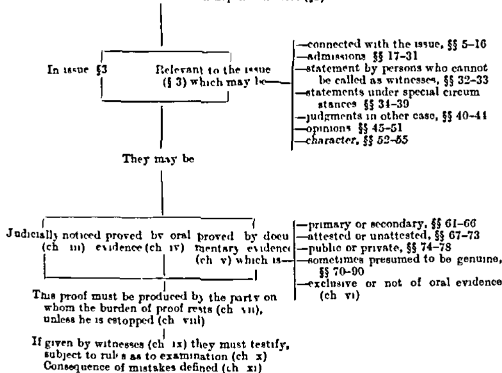
Some facts are too notorious to require any proof at all, and of these the Court will take judicial notice, but if a fact does require proof, the instrument by which the Court must be convinced of it is evidence, by which I mean the actual words uttered, or documents, or other things actually produced in Court, and not the facts which the Court considers to be proved by those words and documents Evidence in this sense of the word must be either (1) oral or (2) documentary. A third class might be formed of things produced in Court, not being documents, such as the instruments with which a crime was committed or the property to which damage had been done, but this division would introduce needless intricacy into the matter The reason for distinguishing between oral and documentary evidence is that in many cases the existence of the latter excludes the employment of the former, but [15] the condition of material things, other than documents, is usually proved by oral evidence, so that there is no occasion to distinguish between oral and material evidence

It may be said that in strictness all evidence is oral, as documents or other material things must be identified by oral evidence before the Court can take notice of them It is unnecessary to discuss the justice of this criticism, as the phrase 'documentary evidence' is not ambiguous, and is convenient and in common use The only reason for avoiding the use of the word 'evidence' in the general sense in which most writers use it, is that it leads, in practice, to confusion, as has been already pointed out

Production of proof

III *The Production of Proof*—This includes the subject of the burden of proof · the rules upon which answer the question, by whom is proof to be given The subject of witnesses. the rules upon which answer the question, who is to give evidence and under what conditions? The subject of the examination of witnesses · the rules upon which answer the question how are the witnesses to be examined, and how is their evidence to be tested? Lastly, the effect upon the subsequent proceedings, of mistakes in the reception and rejection of evidence, may be included under this head.

The following tabular scheme of the subject may be an assistance to the reader. The figures refer to the sections of the Act which treat of the matter referred to:—



[17] CHAPTER II.

A STATEMENT OF THE PRINCIPLES OF INDUCTION AND DEDUCTION, AND A COMPARISON OF THEIR APPLICATION TO SCIENTIFIC AND JUDICIAL INQUIRIES

The general analysis given in the last chapter of the subjects to which the law of evidence must relate sufficiently explains the general arrangement of the Indian Evidence Act To understand the substance of the Act it is necessary to have some acquaintance with the general theory of judicial evidence The object of the present chapter is to explain this theory and to compare its application to physical science with its application to judicial inquiries

Mr Huxley on physical science and judicial inquiries

Mr Huxley remarks in one of his latest works—" The vast results obtained by science are won by no mystical faculties, by no mental processes other than those which are practised by everyone of us in the humblest and meanest affairs of life A detective policeman discovers a burglar from the marks made by his shoe, by a mental process identical with that by which Cuvier restored the extinct animals of Montmartre from fragments of their bones, nor does that process of induction and deduction by which a lady finding [18] a stain of a particular kind upon her dress concludes that somebody has upset the inkstand thereon *differ in any way from that by which Adams and Leverrier discovered* a new planet * The man of science in fact, simply uses with scrupulous exactness the methods which we all habitually and at every moment use carelessly "

Application of his remarks to law of evidence

These *observations are capable of an inverse application* If we wish *to* apply the methods in question to the investigation of matters of every day occurrence with a greater degree of exactness than is commonly needed, it is necessary to know something of the theory on which they rest This is specially important when, as in judicial proceedings, it is necessary to impose conditions by positive law upon such investigations On the other hand, when such conditions have been imposed, it is difficult to understand their importance or their true significance, unless the theory on which they are based is understood It appears necessary for these reasons to enter to a certain extent upon the general *subject of the investigation of the truth as to* matters of fact, before attempting to explain and discuss that particular branch of it which relates to judicial proceedings

General object *of* science

First, then, what is the general problem of science ? It is to discover, *collect* and *arrange* true propositions about facts Simple as the phrase appears it is necessary to enter upon some illustration of its terms namely, (1) facts, (2) propositions (3) the truth of propositions

First, then, what are facts ?

Facts

[19] During the whole of our waking life we are in a state of perception. Indeed consciousness and perception are two names for one thing according as we regard it from the passive or active point of view We are conscious of everything that we perceive, and we perceive whatever we are conscious of Moreover our perceptions are distinct from each other, some both in space and time as is the case with all our perceptions of the external world, others, in time only, as is the case with our perceptions of the thoughts and feelings of our own minds

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* Lay Sermons, p 78

External facts

Whatever may be the objects of our perceptions they make up collectively the whole sum of our thoughts and feelings They constitute in short, the world with which we are acquainted for without entering upon the question of the existence of the external world it may be asserted with confidence that our knowledge of it is composed *first* of our perceptions, and, *secondly* of the inferences which we draw from them as to what we should perceive if we were favourably situated for that purpose The human body supplies an illustration of this No one doubts that his own body is composed not only of the external organs which he perceives by his senses but of numerous internal organs most of which it is highly improbable that either he or any one else will ever see or touch and some of which he never can from the nature of things see or touch as long as he lives When he affirms the existence of these organs say the brain or the heart what he means is that he is led to believe from what he [20] has been told by other persons about human bodies or observed himself in other human bodies that if his skull and chest were laid open those organs would be perceived by the senses of persons who might direct their senses towards them.

Internal facts

There is another class of perceptions, transient in their duration and not perceived by the five best marked senses which are nevertheless distinctly perceptible and of the utmost importance These are thoughts and feelings, love hatred anger, intention will, wish knowledge, opinion are all perceived by the person who feels them When it is affirmed that a man *is angry* that he *intends* to sell an estate that he *knows* the meaning of a word that he struck a blow *voluntarily* and not by accident each proposition relates to a matter capable of being as directly perceived as a noise or a flash of light The only difference between the two classes of propositions is this When it is affirmed that a man has a given intention the matter affirmed is one which he and he only can perceive when it is affirmed that a man is sitting or standing the matter affirmed is one which may be perceived not only by the man himself, but by any other person able to see, and favourably situated for the purpose But the circumstance that either event is regarded as being or as having been capable of being perceived by some one or other, is what we mean, and all that we mean when we say that it exists or existed or when we denote the same thing by calling it a fact The word 'fact' is sometimes [21] opposed to theory sometimes to opinion, sometimes to feeling but all these modes of using it are more or less rhetorical When it is used with any degree of accuracy it implies something which exists and it is as difficult to attach any meaning to the assertion that a thing exists which neither is nor under any conceivable circumstances could be, perceived by any sentient being as to attach any meaning to the assertion that anything which can be so perceived does not, or at the time of perception did not exist

Definition of facts in Evidence Act

It is with reference to this that the word 'fact' is defined in the Evidence Act (§ 3) as meaning and including—

(1) Any thing state of things or relation of things capable of being perceived by the senses, and

(2) Any mental condition of which any person is conscious

It is important to remember with respect to facts that as all thought and language contains a certain element of generality it is always possible to describe the same facts with greater or less minuteness and to decompose every fact with which we are concerned into a number of subordinate facts Thus we might speak of the presence of several persons in a room at one time as a fact but if the fact were doubted or if other circumstances rendered it desirable their respective positions their occupations the position of the furniture and many other particulars might have to be specified

Propositions

Such being the nature of facts what is the meaning of a proposition ? A proposition is a [22] collection of words so related as to raise in the minds of those who understand them a corresponding group of images or thoughts

The characteristic by which words are distinguished from other sounds is their power of producing corresponding thoughts or images, I say thoughts *or* images because though most words raise what may be intelligibly called images in the mind this is true principally of those which relate to visible objects. Such words as 'hard 'soft 'taste' 'smell' call up sufficiently definite thoughts but they can hardly be described as images and the same is still more true of words which qualify others like although, 'whereas' and other adverbs prepositions and conjunctions

Illustrations

The statement that a proposition in order to be entitled to the name, must raise in the mind a distinct group of thoughts or images may be explained by two illustrations The words 'that horse is *niger*' form a proposition to every one who knows that *niger* means black but to no one else The words 'I see a sound' form a proposition to no one unless some signification is attached to the word 'sound' (for instance an arm of the sea) which would make the words intelligible

True propositions

Such being a proposition what is a true proposition ? A true proposition is one which excites in the mind thoughts or images corresponding to those which would be excited in the mind of a person so situated as to be able to perceive the facts to which the proposition relates The words a man is riding down the road on a white horse' form a proposition because they raise in the mind [23] a distinct group of images The proposition is true if all persons favourably situated for purposes of observation did actually perceive a corresponding group of facts

How true propositions are to be framed

The next question is, How are we to proceed in order to ascertain whether any given proposition about facts is true and in order to frame true propositions about facts ? This as already observed is the general problem of science which is only another name for knowledge so arranged as to be easily understood and remembered

Facts must be correctly observed and properly recorded

The facts in the first place must be correctly observed The observations made must in the next place be recorded in apt language and each of these operations is one of far greater delicacy and difficulty than is usually supposed, for it is almost impossible to discriminate between observation and inference or to make language a bare record of our perceptions instead of being a running commentary upon them To go into these and some kindred points would extend this inquiry beyond all reasonable bounds and I accordingly pass them over with this slight reference to their existence Assuming then the existence of observation and language sufficiently correct for common purposes how are they to be applied to inquiries into matters of fact ?

Mr Mill's theory of logic —a fixed order prevails in the world

An answer to these questions sufficient for the present purpose will be supplied by giving a short account of what is said on the [24] subject by Mr Mill in his treatise on logic The substance of that part of it which bears upon the present subject is as follows The first great lesson learnt from the observation of the world in which we live is that a fixed order prevails amongst the various facts of which it is composed Under given conditions fire always burns wood lead always sinks in water day always follows night and night day, and so on By degrees we are able to learn what the conditions are under which these and other such events happen We learn for instance that the presence of a certain quantity of air is a condition of combustion, that the presence of the force of gravitation the absence of any equal or greater force acting in an opposite direction and the maintenance by the water of its properties as a fluid are conditions necessary to the sinking of lead in water that the

maintenance by the heavenly bodies of their respective positions, and the persistency of the various forces by which their paths are determined, are the conditions under which day and night succeed each other

The great problem is to find out what particular antecedents and consequents are thus connected together and what are the conditions of their connection? For this purpose two processes are employed, namely, induction and deduction Deduction assumes and rests upon previous inductions, and derives a great part at least of its value from the means which it affords of carrying on the process of thought from the point at which induction stops The questions—What is [25] the ultimate foundation of induction? Why are we justified in believing that all men will die because we have reason to believe that all men hitherto have died? Or that every particle of matter whatever will continue to attract every other particle of matter with a force bearing a certain fixed proportion to its mass and its distance, because other particles of matter have hitherto been observed to do so are questions which lie beyond the limits of the present inquiry For practical purposes it is enough to assume that such inferences are valid, and will be found by experience to yield true results in the shape of general propositions from which we can argue downwards to particular cases according to the rules of verbal logic

Induction and deduction

True general propositions, however, cannot be extracted directly from the observation of nature or of human conduct as every fact which we can observe, however apparently simple, is in reality so intricate that it would give us little or no information unless it were connected with and checked by other facts What for instance, can appear more natural and simple than the following facts? A tree is cut down It falls to the ground Several birds which were perched upon it fly away Its fall raises a cloud of dust which is dispersed by the wind and splashes up some of the water in a pond Natural and simple as this seems, it raises the following questions at least Why did the tree fall at all? The tree falling why did not the birds fall too, and how came they to fly away? What became of the dust, and why did it disappear in the air whereas the water fell [26] back into the pond from which it was splashed? To see in all these facts so many illustrations of the rules by which we can calculate the force of gravity, and the action of fluids on bodies immersed in them is the problem of science in general and of induction and deduction in particular

Mere observation of facts insufficient

Generally speaking, this problem is solved by comparing together different groups of facts resembling each other in some particulars and differing in others and the different inductive methods described by Mr Mill are in reality no more than rules for arranging these comparisons The methods which he enumerates are five * but the three last are little more than special applications of the other two—the method of agreement and the method of difference Indeed the method of agreement is inconclusive, unless it is applied upon such a scale as to make it equivalent to the method of difference

Proceeding of induction

The nature of these methods is as follows —

All events may be regarded as effects of antecedent causes

Every effect is preceded by a group of events, one or more of which are its true cause or causes and all of which are possible causes

Methods of agreement and difference

The problem is to discriminate between the possible and the true causes

[27] If whenever the effect occurs one possible cause occurs, the other possible causes varying, the possible cause which is constant is probably the true cause and the strength of this probability is measured by the persistency

* 1—The method of agreement 2—The method of difference 3—The joint method of agreement and difference 4—The method of residues 5—The method of concomitant variations

with which the one possible cause recurs, and the extent to which the other possible causes vary Arguments founded on such a state of things are arguments on the method of agreement

If the effect occurs when a particular set of possible causes precedes its occurrence, and does not occur when the same set of possible causes co-exist, one only being absent the possible cause which was present when the effect was produced and was absent when it was not produced is the true cause of the effect Arguments founded on such a state of things are arguments on the method of difference

The following illustration makes the matter plain Various materials are mixed together on several occasions In each case soap is produced, and in each case oil and alkali are two of the materials so mixed It is probable from this that oil and alkali are the causes of the soap and the degree of the probability is measured by the number of the experiments and the variety of the ingredients other than oil and alkali This is the method of agreement

Various materials, of which oil and alkali are two, are mixed and soap is produced The same materials, with the exception of the oil and alkali, are mixed and soap is not produced The mixture of the oil and alkali is the cause of the soap This is the method of difference The case [28] would obviously be the same if oil and alkali only were mixed Soap was unknown and upon the mixture being made, other things being unchanged soap came into existence

Difficulties—Several causes producing the same effect—result as to method of agreement

These are the most important of the rules of induction, but induction is only one step towards the solution of the problems which nature presents In the statement of the rules of induction it is assumed for the sake of simplicity that all the causes and all the effects under examination are separate and independent facts, and that each cause is connected with some one single effect This, however, is not the case A given effect may be produced by any one of several causes Various causes may contribute to the production of a single effect This is peculiarly important in reference to the method of agreement If that method is applied to a small number of instances, its value is small For instance, other substances might produce soap by their combination besides oil and alkali, say, for instance, that the combination of *A* and *B* and that of *C* and *D* would do so Then, if there were two experiments as follows

(1) oil and alkali *A* and *B*, produce soap,

(2) oil and alkali, *C* and *D*, produce soap,

soap would be produced in each case, but whether by the combination of oil and alkali, or by the combination of *A* and *B*, or by that of *C* and *D*, or by the combination of oil, or of alkali, with *A*, *B*, *C* or *D*, would be altogether uncertain

[29] A watch is stolen, from a place to which *A*, *B* and *C* only had access Another watch is stolen from another place to which *A*, *D* and *E* only had access.

In each instance, *A* is one of three persons, one of whom must have stolen the watch, but this is consistent with its having been stolen by any of the other persons mentioned

Weakness of the method of agreement—how cured

This weakness of the method of agreement can be cured only by so great a multiplication of instances as to make it highly improbable that any other antecedent than the one present in every instance could have caused the effect present in every instance

For the statement of the theory of chances and its bearing on the probability of events, I must refer those who wish to pursue the subject to the many works which have been written upon it, but its general validity will be inferred

by every one from the common observation of life If it was certain that either A or B, A or C, A or D, and so forth, up to A or Z, had committed one of a large number of successive thefts of the same kind, no one could doubt that A was the thief

It is extremely difficult in practice, to apply such a test as this and the test when applied is peculiarly liable to error, as each separate alternative requires distinct proof In the case supposed, for instance, it would be necessary to ascertain separately in each of the cases relied upon, first, that a theft had been committed then that one of two persons must have committed it; and [30] lastly, that in each case the evidence bore with equal weight upon each of them

The intermixture of effects and the interference of causes with each other is a matter of much greater intricacy and difficulty

Intermixture of effects and interference of causes with each other.

It may take place in one of two ways, viz —

(1) "In the one which is exemplified by the joint operation of different forces in mechanics the separate effects of all the causes continue to be produced but are compounded together, and disappear in one total

(2) "In the other, illustrated by the case of chemical action the separate effects cease entirely and are succeeded by phenomena altogether different and governed by different laws"

In the second case the inductive methods already stated may be applied, though it has difficulties of its own to which I need not now refer

In the first case, i e, where an effect is not the result of any one cause, but the result of several causes modifying each other's operation, the results cease to be separately discernible Some cancel each other Others merge in one sum and in this case there is often an insurmountable difficulty in tracing by observation any fixed relation whatever between the causes and the effects A body for instance, is at rest This may be the effect of the action of two opposite forces exactly counteracting each other, but how are such causes to be inferred from such an effect?

A balloon ascends into the air This appears, if it is [31] treated as an isolated phenomenon, to form an exception to the theory of gravitation It is in reality an illustration of that theory, though several concomitant facts and independent theories must be understood and combined together before th[illegible] can be ascertained

The difficulty of applying the inductive methods to such cases arises from the fact that they assume the absence of the state of things supposed [illegible] subsequent and antecedent phenomena must be assumed to be capable of specific and separate observation before it can be asserted that a [illegible] invariably follows another given fact, or that two sets of possible causes [illegible] each other in every particular with a single exception

It is necessary for this reason to resort to the deductive method, [illegible] of which is as follows A general proposition established by in[illegible] as a premiss from which consequences are drawn according to th[illegible] as to what must follow under particular circumstances [illegible] drawn is compared with the facts observed, and if the result [illegible] with the deduction from the inductive premiss the inferenc[illegible] menon is explained The complete method, inductive and [illegible] involves three steps,—

(1) Establishing the premiss by induction, or what, [illegible] to the same thing, by a previous deductio[illegible] upon induction,

(2) Reasoning according to the rules of logic to a [illegible]

[32] (3) Verification of the conclusion by observation

Illustration

The whole process is illustrated by the discovery and proof of the identity of the central force of the solar system with the force of gravity as known on the earth's surface The steps in it were as follows —

(1) It was proved by deductions resting ultimately upon inductions that the earth attracts the moon with a force varying inversely as the square of the distance

This is the first step, the establishment of the premiss by a process resting ultimately upon induction

(2) The moon's distance from the earth, and the actual amount of her deflexion from the tangent being known it was ascertained with what rapidity the earth's attraction would cause the moon to fall if she were no further off and no more acted upon by extraneous forces than terrestrial bodies are

This is the second step, the reasoning regulated by the rules of logic

(3) Finally, this calculated velocity being compared with the observed velocity with which all heavy bodies fall by mere gravity towards the surface of the earth (sixteen feet in the first second, forty eight in the second, and so forth in the ratio of the odd numbers), the two quantities are found to agree

This is the verification The facts observed agree with the facts calculated, therefore the true principle of calculation has been taken

This paraphrase, for it is no more, of Mr Mill is, I hope [33] sufficient to show, in general, the nature of scientific investigation and the manner in which it aims at framing true propositions about matters of fact It would be foreign to the present purpose to follow the subject further Enough has been said to illustrate the general meaning of such words as "proof" and "evidence" in their application to scientific inquiry Before inquiring into the application of these principles to judicial investigations, it will be convenient to compare the conditions under which judicial and scientific investigations are carried on

Judicial and scientific inquiries compared—resemblances

In some essential points they resemble each other Inquiries into matters of fact, of whatever kind and with whatever object are, in all cases whatever, inquiries from the known to the unknown from our present perceptions or our present recollection (which is in itself a present perception), of past perceptions, to what we might perceive or might have perceived, if we now were, or formerly had been, or hereafter should be favourably situated for that purpose They proceed upon the supposition that there is a general uniformity both in natural events and in human conduct, that all events are connected together as cause and effect, and that the process of applying this principle to particular cases and of specifying the manner in which it works, though a difficult and delicate operation, can be performed

Differences

There are, however, several great differences between inquiries which are commonly called scientific inquiries, that is into the order and course of nature and inquiries into isolated matters of fact, whether [34] for judicial or historical purposes, or for the purposes of every day life These differences must be carefully observed before we can undertake with much advantage the task of applying to the one subject the principles which appear to be true

First difference as to amount of evidence

The first difference is, that in reference to isolated events, we can never, or very seldom perform experiments but are tied down to a fixed number of relevant facts which can never be increased

In scientific inquiries unlimited

The great object of physical science is to invent general formulas (perhaps unfortunately called laws), which when ascertained, sum up and enable us to understand the present, and predict the future course of nature These laws are ultimately deduced by the method already described from individual facts, but any one fact of an infinite number will serve the purpose of a scientific

inquirer as well as any other and in many, perhaps in most, cases it is possible to arrange facts for the purpose. In order, for instance, to ascertain the force of terrestrial gravity, it was necessary to measure the time occupied by different bodies in falling through given spaces, and every such observation was an isolated fact. If however, one experiment failed, or was interfered with, if an observation was inaccurate, or if a disturbing cause, as for instance, the resistance of the atmosphere had not been allowed for, nothing could be easier than to repeat the process, and inferences drawn from any one set of experiments [35] were obviously as much to be trusted as inferences drawn from any other set. Thus with regard to inquiries into physical nature relevant facts can be multiplied to a practically unlimited extent, and it may, by the way, be observed that the ease with which this has been assumed in all ages, is a strong argument that the course of nature does impress mankind as being uniform under superficial variations. For many centuries before the modern discoveries in astronomy were made, the motions of the heavenly bodies were carefully observed and inferences as to their future course were founded upon those observations. Such observations would have been useless and unmeaning but for the tacit assumption that what they had done in times past, they would continue to do for the future.

In judicial inquiries limited.

In inquiries into isolated events this great resource is not available. Where the object is to decide what happened on a particular occasion, we can hardly ever draw inferences of any value from what happened on similar occasions, because the groups of events which form the subject of historical or judicial inquiry are so intricate that it can scarcely ever be assumed that they will repeat, or that they have repeated themselves. If we wish to know what happened two thousand years ago, when specific quantities of oxygen and hydrogen were combined under given circumstances, we can obtain complete certainty by repeating the experiment, but the whole course of human history must recur before we could witness a second assassination of Julius Cæsar.

It cannot be increased.

[36] With reference to such events we are tied down inexorably to a certain limited amount of evidence. We know so much of the assassination of Cæsar as has been told us by the historians who are to us ultimate authorities, and we know no more. Their testimony must be taken subject to all the deductions which experience shows to be necessary in receiving as true, statement made by historical writers on subjects which interest their feelings, and upon the authority of materials which are no longer extant and therefore cannot be weighed or criticized. Unless, by some unforeseen accident, new materials on the subject should come to light, a few pages of general history will for ever comprise the whole amount of human knowledge upon this subject, and any doubts about it, whether they rise from inherent improbabilities in the story itself, from differences of detail in the different narratives, or from general considerations as to the untrustworthy character of historians writing on hearsay, and at a considerable distance of time from the events which they relate, are and must remain for ever, unsolved and insoluble.

Object of scientific inquiries.

Besides this difference as to the quantity of evidence accessible in scientific and historical inquiries, there is a great difference as to the objects to which the inquiries are directed. The object of inquiries into the course of nature is twofold:—the satisfaction of a form of curiosity, which, to those who feel it at all, is one of the most powerful, and which happens also to be one of the most generally useful elements of human [37] nature, and the attainment of practical results of very various kinds. Neither of these ends can be attained unless and until the problems stated by nature have been solved, partially, it may be but at all events truly, as far as the solution goes. On the other hand, there is no pressing or immediate necessity for their solution. Every scientific question is always open, and the answer to it may be discovered after vain attempts to discover it have been made for thousands of years, or an answer long accepted may

be rejected and replaced by a better answer after an equally long period In short, in scientific inquiries, absolute truth, or as near an approach to it as can be made is the one thing needful, and is the constant object of pursuit So long as any part of his proof remains incomplete, so long as any one ascertained fact does not fit into and exemplify his theory, the scientific inquirer neither is, nor ought to be, satisfied Until he has succeeded in excluding the possibility of error, he is bound, to the extent, at least, of that possibility, to suspend his judgment

Object of judicial inquiries

In judicial inquiries (I need not here notice historical inquiries) the case is different It is necessary for urgent practical purposes to arrive at a decision which, after a definite process has been gone through, becomes final and irreversible It is obvious that, under these circumstances, the patient suspension of judgment, and the high standard of certainty required by scientific inquirers, cannot be expected Judicial decisions must proceed upon imperfect materials and must be made at the risk of error

Evidence in scientific inquiries trustworthy

[38] Finally, inquirers into physical science have an additional advantage over those who conduct judicial inquiries, in the fact that the evidence before them, in so far as they have to depend upon oral evidence, is infinitely more trustworthy than that which is brought forward in Courts of Justice The reasons of this are manifold In the first place, the facts which a scientific observer has to report do not affect his passions In the second place, his evidence about them is not taken at all unless his powers of observation have been more or less trained and can be depended upon In the third place, he can hardly know what will be the inference from the facts which he observes until his observations have been combined with those of other persons so that if he were otherwise disposed to mis state them, he would not know what mis statement would serve his purpose In the fourth place, he knows that his observations will be confronted with others, so that if he is careless or inaccurate, and, *a fortiori*, if he should be dishonest, he would be found out In the fifth place, the class of facts which he observes are, generally speaking, simple and he is usually provided with means specially arranged for the purpose of securing accurate observations, and a careful record of its results

Evidence in judicial inquiries less trustworthy

The very opposite of all this is true as regards witnesses in a Court of Justice The facts to which they testify are as a rule, facts in which they are more or less interested, and which in many cases excite their strongest passions to the highest degree [39] The witnesses are very seldom trained to observe any facts or to express themselves with accuracy upon any subject They know what the point at issue is, and how their evidence bears upon it, so that they can shape it according to the effect which they wish to produce They are generally so situated that a large part, at least, of what they say is secure from contradiction, and the facts which they have to observe being in most instances portions of human conduct, are so intricate that even with the best intention on the part of the witness to speak the truth he will generally be inaccurate and almost always incomplete, in his account of what occurred

Advantages of judicial over scientific inquiries

[illegible] So far it appears that our opportunities for investigating and proving the existence of isolated facts are much inferior to our opportunities for investigating and proving the formulas which are commonly called the laws of nature There is, however, something to be said on the other side Though the evidence available in judicial and historical inquiries is often scanty, and is always fixed in amount, and though the facts which form the subject of such inquiries are far more intricate than those which attract the inquirer into physical nature, though the judge and the historian can derive no light from experiments, though in a word, their apparatus for ascertaining the truth is far inferior to that of which physical inquirers dispose, the task which they have to perform is proportionally easier and less ambitious It is attended moreover, by some special facilities which are great helps in performing it satisfactorily

[40] The question whether it is in the nature of things possible that general formulas should ever be devised by the aid of which human conduct can be explained and predicted in the short specific manner in which physical phenomena are explained and predicted has been the subject of great discussion, and is not yet decided but no one doubts that approximate rules have been framed which are sufficiently precise to be of great service in estimating the probability of particular events Whether or not any proposition as to human conduct can ever be enunciated approaching in generality and accuracy to the proposition that the force of gravity varies inversely as the square of the distance no one would feel disposed to deny that a recent possessor of stolen property who does not explain his possession is probably either the thief or a receiver or that if a man refuses to produce a document in his possession, the contents of the document are probably unfavourable to him In inquiries into isolated facts for practical purposes, such rules as these are nearly as useful as rules of greater generality and exactness though they are of little service when the object is to interpret a series of facts either for practical or theoretical purposes If for instance, the question is whether a particular person committed a crime in the course of which he made use of water, knowledge of the facts that there was a pump in his garden and that water can be drawn from a well by working the pump handle, is as useful as the most perfect knowledge of hydrostatics But if the question were as to the means by which water [41] could be supplied for a house and field during the year considerable knowledge of the theory and practice of hydrostatics and of various other subjects might be necessary, and the more extensive the undertaking might be the wider would be the knowledge required Maxims more easily appreciated

To this it must be added that the approximate rules which relate to human conduct are warranted principally by each man's own experience of what passes in his own mind, corroborated by his observation of the conduct of other persons which every one is obliged to interpret upon the hypothesis that their mental processes are substantially similar to his own Experience appears to show that the results given by this process are correct within narrower limits of error than might have been supposed, though the limits are wide enough to leave room for the exercise of a great amount of individual skill and judgment Their limitations more easily perceived

This circumstance invests the rules relating to human conduct with a very peculiar character They are usually expressed with little precision, and stand in need of many exceptions and qualifications but they are of greater practical use than rough generalizations of the same kind about physical nature, because the personal experience of those by whom they are used readily supplies the qualifications and exceptions which they require Compare two such rules as these 'heavy bodies fall to the ground,' 'the recent possessor of stolen goods is the thief The rise of a balloon into the air would constitute an unexplained exception to the first of these rules which might [42] throw doubt upon its truth, but no one would be led to doubt the second by the fact that a shopkeeper doing a large trade had in his till stolen coins shortly after they had been stolen, without having stolen them Every one would see at once that such a case formed one of the many unstated exceptions to the rule The reason is, that we know external nature only by observation of a neutral, unsympathetic kind whereas every man knows more of human nature than any general rule on the subject can ever tell him

To these considerations it must be added that to inquire whether an isolated fact exists is a far simpler problem than to ascertain and prove the rule according to which facts of a given class happen The enquiry falls within a smaller compass The process is generally deductive The deductions depend upon previous inductions of which the truth is generally recognised, and which (at least in judicial inquiries) generally share in the advantage just noticed of appealing directly to the personal experience and sympathy of the Judge The Judicial problems are simpler than scientific problems

deductions, too, are, as a rule, of various kinds and so cross and check each other, and thus supply each other's deficiencies

Illustrations

For instance, from one series of facts it may be inferred that *A* had a strong motive to commit a crime, say the murder of *B* From an independent set of facts it may be inferred that *B* died of poison, and from another independent set of facts that *A* administered the poison of which *B* died The question is whether **[43]** *A* falls within the small class of murderers by poison If he does, various propositions about him must be true, no two of which have any necessary connection, except upon the hypothesis that he is a murderer In this case three such propositions are supposed to be true, *viz*, (1) the death of *B* by poison, (2) the administration of it by *A*, and (3) the motive for its administration Each separate proposition, as it is established, narrows the number of possible hypotheses upon the subject When it is established that *B* died of poison innumerable hypotheses which would explain the fact of his death consistently with *A*'s innocence are excluded, when it is proved that *A* administered the poison of which *B* died every supposition, consistent with *A*'s innocence, except those of accident, justification, and the like, are excluded, when it is shown that *A* had a motive for administering the poison, the difficulty of establishing any one of these hypotheses, *e g*, accident, is largely increased, and the number of suppositions consistent with innocence is narrowed in a corresponding degree

In judicial inquiries parties interested have opportunities to be heard

This suggests another remark of the highest importance in estimating real weight of judicial inquiries It is that such inquiries in all civilized countries are, or at least ought to be, conducted in such a manner as to give every person interested in the result the fullest possible opportunity of establishing the conclusion which he wishes to establish In the illustration just given *A* would have at once the strongest motive to explain the fact that he had administered the poison to **[44]** *B* and every opportunity to do so Hence, if he failed to do it, he would either be a murderer or else a member of that infinitesimally small class of persons who, having a motive to commit murder, and having administered poison to the person whom they have a motive to murder, are unable to suggest any probable reason for supposing that they did administer it innocently

Summary of results.

The results of the foregoing inquiry may be shortly summed up as follows —

I The problem of discovering the truth in relation to matters which are judicially investigated is a part of the general problem of science,—the discovery of true propositions as to matters of fact

II The general solution of this problem is contained in the rules of induction and deduction stated by Mr Mill, and generally employed for the purpose of conducting and testing the results of inquiries into physical nature

III By the due application of these rules facts may be exhibited as standing towards each other in the relation of cause and effect and we are able to argue from the cause to the effect and from the effect to the cause with a degree of certainty and precision proportionate to the completeness with which the relevant facts have been observed or are accessible

IV The leading differences between judicial investigations and inquiries into physical nature are as follows —

1 In physical inquiries the number of relevant facts is generally unlimited, and is capable of indefinite increase by experiments

[45] In judicial investigations the number of relevant facts is limited by circumstances and is incapable of being increased

2 Physical inquiries can be prolonged for any time that may be required in order to obtain full proof of the conclusion reached and when a conclusion has been reached it is always liable to review if fresh facts are discovered, or if any objection is made to the process by which it was arrived at

In judicial investigation it is necessary to arrive at a definite result in a limited time and when that result is arrived at, it is final and irreversible with exceptions too rare to require notice

3 In physical inquiries the relevant facts are usually established by testimony open to no doubt because they relate to simple facts which do not affect the passions which are observed by trained observers who are exposed to detection if they make mistakes and who could not tell the effect of misrepresentation if they were disposed to be fraudulent

In judicial inquiries the relevant facts are generally complex They affect the passions in the highest degree They are testified to by untrained observers who are generally not open to contradiction, and are aware of the bearing of the facts which they allege upon the conclusion to be established

4 On the other hand, approximate generalizations are more useful in judicial than they are in scientific inquiries because in the case of judicial inquiries every man s [46] individual experience supplies the qualifications and exceptions necessary to adjust general rules to particular facts, which is not the case in regard to scientific inquiries

5 Judicial inquiries being limited in extent, the process of reaching as good a conclusion as is to be got out of the materials is far easier than the process of establishing a scientific conclusion with complete certainty, though the conclusion arrived at is less satisfactory

Judicial inquiries usually produce only a very high degree of probability

It follows from what precedes that the utmost result that can in any case be produced by judicial evidence is a very high degree of probability Whether upon any subject whatever more than this is possible—whether the highest form of scientific proof amounts to more than an assertion that a certain order in nature has hitherto been observed to take place, and that if that order continues to take place such and such events will happen, are questions which have been much discussed but which lie beyond the sphere of the present inquiry However this may be, the reasons given above show why Courts of Justice have to be contented with a lower degree of probability than is rightly demanded in scientific investigation The highest probability at which a Court of Justice can under ordinary circumstances arrive is the probability that a witness or a set of witnesses affirming the existence of a fact which they say they perceived by their own senses, and upon which they could not be mistaken, tell the truth It is difficult to measure the value of such a probability against those which the theories of physical inquirers produce, nor would it serve [47] any practical purpose to attempt to do so It is enough to say that the process by which a comparatively low degree of probability is shown to exist in the one case is identical in principle with that by which a much higher degree of probability is shown to exist in the other case

Degrees of probability—moral certainty

The degrees of probability attainable in scientific and in judicial inquiries are infinite and do not admit of exact measurement or description Cases might easily be mentioned in which the degree of probability obtained in either is so high, that if there is any degree of knowledge higher in kind than the knowledge of probabilities, it is impossible for any practical purpose to distinguish between the two Whether any higher degree of assurance is conceivable than that which may easily be obtained of the facts that the earth revolves round the sun, and that Delhi was besieged and taken by the English in 1857, is a question which does not belong to this inquiry For all practical purposes such conclusions as these may be described as absolutely certain From these

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down to the faintest guess about the inhabitants of the stars, and the faintest suspicion that a particular person has committed a crime, there is a descending scale of probabilities which does not admit of any but a very rough measurement for practical purposes The only point in it worth noticing is what is commonly called moral certainty, and this means simply such a degree of probability as a prudent man would act upon under the circumstances in which he [48] happens to be placed in reference to the matter of which he is said to be morally certain

Moral certainty is a question of prudence

What constitutes moral certainty is thus a question of prudence, and not a question of calculation It is commonly said in reference to judicial inquiries that in criminal cases guilt ought to be proved "beyond all reasonable doubt," and that in civil cases the decision ought to be in favour of the side which is most probably right To the latter part of this rule there is no objection, though it should be added that it cannot be applied absolutely without reserve For instance a Civil case in which character is at stake partakes more or less of the nature of a Criminal proceeding, but the first part of the rule means nothing more than that in most cases the punishment of an innocent man is a great evil and ought to be carefully avoided, but that, on the other hand, it is often impossible to eliminate an appreciable though undefinable degree of uncertainty from the decision that a man is guilty The danger of punishing the innocent is marked by the use of the expression "no doubt," the necessity of running some degree of risk of doing so in certain cases is intimated by the word "reasonable" The question, what sort of doubt is "reasonable" in Criminal cases is a question of prudence Hardly any case ever occurs in which it is not possible for an ingenious person to suggest hypotheses consistent with the prisoner's innocence The hypotheses of falsehood on the part of the witnesses can never be said to be more than highly improbable

Principle of estimating probabilities is that of Mr Mill's method of difference

[49] Though it is impossible to invent any rule by which different probabilities can be precisely valued, it is always possible to say whether or not they fulfil the conditions of what Mr Mill describes as the method of Difference, and if not, how nearly they approach to fulfilling it The principle is precisely the same in all cases, however complicated or however simple, and whether the nature of the inquiry is scientific or judicial In all cases the known facts must be arranged and classified with reference to the different hypotheses, or unknown or suspected facts, by which the existence of the known facts can be accounted for If every hypothesis except one is inconsistent with one or more of the known facts, that one hypothesis is proved If more than one hypothesis is consistent with the known facts, but one only is reasonably probable—that is to say, if one only is in accordance with the common course of events, that one in judicial inquiries may be said to be proved "beyond all reasonable doubt" The word "reasonable" in this sentence denotes a fluctuating and uncertain quantity of probability (if the expression may be allowed), and shows that the ultimate question in judicial proceedings is and must be in most cases a question of prudence

Illustration

Let the question be whether *A* did a certain act, the circumstances are such that the act must have been done by somebody, but it can have been done only by *A* or by *B* If *A* and *B* are equally likely to have done the act, the matter cannot be carried further, [50] and the question Who did it? must remain undecided But if the act must have been done by one person, if it required great physical strength and if *A* is an exceedingly powerful man and *B* a child, it may be said to be proved that *A* did it If *A* is stronger than *B*, but the disproportion between their strength is less, it is probable that *A* did it, but not impossible that *B* may have done it, and so on In such a case as this a nearer approach than usual to a distinct measurement of the probability is possible, but no complete and definite statement on the subject can be made

Such being the general nature of the object towards which judicial inquiries are directed and the general nature of the process by which they are carried on, it will be well to examine the chief forms of that process somewhat more particularly

Judicial inquiries involve two classes of inferences

It will be found upon examination that the inferences employed in judicial inquiries fall under two heads —

(1) Inferences from an assertion whether oral or documentary, to the truth of the matter asserted

(2) Inferences from facts which upon the strength of such assertions, are believed to exist to facts of which the existence has not been so asserted

For the sake of simplicity I do not here distinguish various subordinate classes of inferences such as inferences from the manner in which assertions are made from silence from the absence of assertion and from the conduct of the parties They may be regarded as so many forms of assertion, and may there fore be classed [51] under the general head of inferences from an assertion to the truth of the matter asserted

Direct and circumstantial evidence

This is the distinction usually expressed by saying that all evidence is either direct or circumstantial I avoid the use of this expression, partly because as I have already observed direct *evidence* means direct assertion whereas circum stantial *evidence* means a fact on which an inference is to be founded and partly for the more important reason that the use of the expression favours an unfound ed notion that the principles on which the two classes of inference depend are different and that they have different degrees of cogency, which admit of comparison The truth is that each inference depends upon precisely the same general theory, though somewhat different considerations apply to the investi gation of cases in which the facts testified to are many, and to cases in which the facts testified to are few

The general theory has been already stated In every case the question is, are the known facts inconsistent with any other than the conclusion suggested? The known facts in every case whatever are the evidence in the narrower sense of the word The Judge hears with his own ears the statements of the witnesses and sees with his own eyes the documents produced in Court His task is to infer from what he thus sees and hears, the existence of facts which he neither sees nor hears

Illustration

Let the question be whether a will was executed Three witnesses entirely above suspicion, come [52] and testify that they witnessed its execution These assertions are facts which the Judge hears for himself Now there are three possible suppositions, and no more, which the Judge has to consider in proceeding from the known fact, the assertion of the witnesses that they saw the will executed to the fact to be proved—the actual execution of the will

(1) The witnesses may be speaking the truth

(2) The witnesses may be mistaken

(3) The witnesses may be telling a falsehood

The circumstances may be such as to render suppositions (2) and (3) improbable in the highest degree and generally speaking they would be so In such a case the first hypothesis *i e*, that the will really was executed as alleged, would be proved The facts before the Judge would be inconsistent with any other reasonable hypothesis except that of the execution of the will This would be commonly called a case of direct evidence

this cess Mr theory

Let the question be whether *A* committed a crime The facts which the Judge actually knows are that certain witnesses made before him a variety of statements which he believes to be true The result of these statements is to establish certain facts which show that either *A* or *B* or *C* must have

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experience by which an observant man forms an opinion as to whether a witness is or is not lying, is by far the most important of all a Judge's qualifications infinitely more important than any acquaintance with law or with rules of evidence No trial ever occurs in which the exercise of this faculty is not required but it is only in exceptional cases that questions arise which present any legal difficulty or in which it is necessary to exercise any particular ingenuity in putting together the different facts which the evidence tends to establish This pre eminently important power for a Judge is not to be learnt out of books In so far as it can be acquired at all, it is to be acquired only by experience for the acquisition of which the position of a Judge is by no means peculiarly favourable People come before him with their cases ready prepared and give the evidence which they have determined to give Unless he knows them in their unrestrained and familiar moments he will have great difficulty in finding any good reason for believing one man rather than another The [56] rules of evidence may provide tests the value of which has been proved by long experience by which Judges may be satisfied that the quality of the materials upon which their judgments are to proceed is not open to certain obvious objections but they do not profess to enable the Judges to know whether or not a particular witness tells the truth or what inference is to be drawn from a particular fact The correctness with which this is done must depend upon the natural sagacity the logical power and the practical experience of the Judge not upon his acquaintance with the law of evidence

The grounds for believing or disbelieving particular statements made by particular people under particular circumstances may be brought under three heads —those which affect the power of the witness to speak the truth , those which affect his will to do so and those which arise from the nature of the statement itself and from surrounding circumstances A man's power to speak the truth depends upon his knowledge and his power of expression This knowledge depends partly on his accuracy in observation partly on his memory partly on his presence of mind , his power of expression depends upon an infinite number of circumstances and varies in relation to the subject of which he has to speak Grounds for believing and dis believing a witness Power

A man's will to speak the truth depends upon his education his character his courage his sense of duty, his relation to the particular facts as to which he is to testify his humour for the moment and a thousand [57] other circum stances as to the presence or absence of which in any particular case it is often difficult to form a true opinion Will

The third set of reasons are those which depend upon the probability of the statement

Many discussions have taken place on the effect of the improbability of a statement upon its credibility in cases which can never fall under judicial con sideration It is unnecessary to enter upon that subject here Looking at the matter merely in relation to judicial inquiries, it is sufficient to observe that whilst the improbability of a statement is always a reason and may be, in practice a conclusive reason for disbelieving it its probability is a poor reason for believing it if it rests upon uncorroborated testimony Probable falsehoods are those which an artful liar naturally tells , and the fact that a good opportunity for telling such a falsehood occurs is the commonest of all reasons for its being told Probability of state ment

Upon the whole, it must be admitted that little that is really serviceable, can be said upon the inference from an assertion to the truth of the matter asserted The observations of which the matter admits are either generalities too vague to be of much practical use or they are so narrow and special that they can be learnt only by personal observations and practical experience Such observations are seldom if ever, thrown by those who make them into

committed the crime, and that neither B nor C did commit it In this case the facts before the Judge would be inconsistent with any other reasonable hypothesis except that A committed the crime This would be commonly called a case of circumstantial evidence yet it is obvious that the principle on which the [53] investigation proceeds as in the last case is identically the same The only difference is in the number of inferences, but no new principle is introduced

It is also clear that each case is identical in principle with the method of difference as explained by Mr Mill

Mr Mill's illustration of the application of that method to the motions of the planets is as follows —The planets with a central force give areas proportional to the times The planets without a central force give a different set of motions but areas proportional to the times are observed Therefore there is a central force

Similarly in the cases suggested The assertions of the witnesses give the execution of a will, *i e*, no other cause can account for those assertions having been made If the will had not been executed those assertions would not have been made *But the* assertions were made Therefore the will was executed.

Though inferences from an assertion to its truth, and inferences from facts taken as true to other facts not asserted to be true, rest upon the same principle, each inference has its peculiarities

Inference from assertion to matter asserted.

The inference from the assertion to the truth of the matter asserted is usually regarded as an easy matter, calling for little remark

Though in particular cases it is really easy, and though in a certain sense it is always easy, to deal with, to deal with it rightly is by far the most difficult task which falls to the lot of a Judge and miscarriages of justice are almost [54] invariably caused by dealing with it wrongly This requires full explanation

To infer from an assertion the truth of the matter asserted is in one sense the easiest thing in the world The intellectual process consists of only one step, and that is a step which gives no trouble, and is taken in most cases unconsciously But to draw the inference in those cases only in which it is true is a matter of the utmost difficulty. If we were able to affirm the proposition, "All men upon all occasions speak the truth" the remaining propositions,—"This man says so and so," "Therefore it is true ... ld present no difficulty The major premiss, however, is subject to wide ex... which are not force... upon the Judge's attention Moreover if th... means of ascertaining whether or not, an... particular case

Its difficulties

How is it possible to tell how far th... a man seen once for a few minutes enabl... motives by any one or more of which ... the truth upon the matter on which he ... a test to a certain extent, but those ... will be disposed to trust it least as a ... be believed A cool steady liar wh... will baffle the most skilful cross ex... not so common in practice as [55] p... from anecdotes or fiction would sup...

Cannot be affected by rules of evidence

No rules of evidence which th... **this difficulty. Judges must** deal ... **natural faculties and acquired** ex... **which they will be involved** by ... **tion of our means of arriving** at trut...

experience by which an observant man forms an opinion as to whether a witness is or is not lying is by far the most important of all a Judge's qualifications infinitely more important than any acquaintance with law or with rules of evidence No trial ever occurs in which the exercise of this faculty is not required, but it is only in exceptional cases that questions arise which present any legal difficulty or in which it is necessary to exercise any particular ingenuity in putting together the different facts which the evidence tends to establish This pre-eminently important power for a Judge is not to be learnt out of books In so far as it can be acquired at all, it is to be acquired only by experience for the acquisition of which the position of a Judge is by no means peculiarly favourable People come before him with their cases ready prepared and give the evidence which they have determined to give Unless he knows them in their unrestrained and familiar moments he will have great difficulty in finding any good reason for believing one man rather than another The [56] rules of evidence may provide tests the value of which has been proved by long experience, by which Judges may be satisfied that the quality of the materials upon which their judgments are to proceed is not open to certain obvious objections but they do not profess to enable the Judges to know whether or not a particular witness tells the truth or what inference is to be drawn from a particular fact The correctness with which this is done must depend upon the natural sagacity the logical power and the practical experience of the Judge, not upon his acquaintance with the law of evidence

The grounds for believing or disbelieving particular statements made by particular people under particular circumstances may be brought under three heads,—those which affect the power of the witness to speak the truth, those which affect his will to do so, and those which arise from the nature of the statement itself and from surrounding circumstances A man's power to speak the truth depends upon his knowledge and his power of expression This knowledge depends partly on his accuracy in observation partly on his memory, partly on his presence of mind, his power of expression depends upon an infinite number of circumstances and varies in relation to [the] subject of which he has to speak

Grounds for believing and disbelieving a witness

Power

A man's will to speak the truth depends upon his educat[ion] ... his courage, his sense of duty, his relation to the particular ... he is to testify, his humour for the moment, and a thousand [57] other ... stances as to the presence or absence of which in any particular case it is often difficult to form a true opinion

Will

Inference from facts proved to ...

The third set of reasons are those which depend upon the probability [of] the statement

Many discussions have taken place on the effect of the improbability o[f a] statement upon its credibility in cases which can never fall under judicial con[]sideration It is unnecessary to enter upon that subject here Looking [at the] matter merely in relation to judicial inquiries it is sufficient to obse[rve] that whilst the improbability of a statement is always a reason and may ... in practice a conclusive reason, for disbelieving it its probability is a po... reason for believing it if it rests upon uncorroborated testimony Probable falsehoods are those which an artful liar naturally tells, and the fact that good opportunity for telling such a falsehood occurs is the commonest of reasons for its being told

... than ... far ... they own ... inde ... al and ... a pro ... rficial ... gest ... as of ... mised ... which ... few

Such inference comparatively easy

Facts must fulfil test of method of difference

Upon the whole, it must be admitted that little that is really servicea[ble] can be said upon the inference from an assertion to the truth of the ma[tter] asserted The observations of which the matter admits are either gener[al] ... too vague to be of much practical use or they are so narrow and spec[ial] ... they can be learnt only by personal observations and practical exp[erience] ... Such observations are seldom if ever thrown by those who make th[e] ...

... ccount of ... ntered it ... he account ... zzled

W, LE

committed the crime, and that neither *B* nor *C* did commit it. In this case the facts before the Judge would be inconsistent with any other reasonable hypothesis except that *A* committed the crime. This would be commonly called a case of circumstantial evidence; yet it is obvious that the principle on which the [53] investigation proceeds as in the last case is identically the same. The only difference is in the number of inferences, but no new principle is introduced.

It is also clear that each case is identical in principle with the method of difference as explained by Mr. Mill.

Mr. Mill's illustration of the application of that method to the motions of the planets is as follows:—The planets with a central force give areas proportional to the times. The planets without a central force give a different set of motions; but areas proportional to the times are observed. Therefore there is a central force.

Similarly in the cases suggested. The assertions of the witnesses prove the execution of a will, *i.e.*, no other cause can account for those assertions having been made. If the will had not been executed those assertions would not have been made. But the assertions were made. Therefore the will was executed.

Though inferences from an assertion to its truth, and inferences from facts taken as true to other facts not asserted to be true, rest upon the same principle, each inference has its peculiarities.

Inference from assertion to matter asserted.

The inference from the assertion to the truth of the matter asserted is usually regarded as an easy matter, calling for little remark.

Though in particular cases it is really easy, and though in a certain sense it is always easy, to deal with, to deal with it rightly is by far the most difficult task which falls to the lot of a Judge, and miscarriages of justice are almost [54] invariably caused by dealing with it wrongly. This requires full explanation.

To infer from an assertion the truth of the matter asserted is in one sense the easiest thing in the world. The intellectual process consists of only one step, and that is a step which gives no trouble, and is taken in most cases unconsciously. But to draw the inference in those cases only in which it is true is a matter of the utmost difficulty. If we were able to affirm the proposition, "All men upon all occasions speak the truth," the remaining propositions,—"This man says so and so," "Therefore it is true," would present no difficulty. The major premiss, however, is subject to wide exceptions, which are not forced upon the Judge's attention. Moreover, if they were, the Judge has often no means of ascertaining whether or not, and to what extent, they apply to any particular case.

Its difficulties.

How is it possible to tell how far the powers of observation and memory of a man seen once for a few minutes enable him, and how far the innumerable motives by any one or more of which he may be actuated dispose him to tell the truth upon the matter on which he testifies? Cross examination supplies a test to a certain extent; but those who have seen most of its application will be disposed to trust it least as a proof that a man not shaken by it ought to be believed. A cool steady liar who happens not to be open to contradiction will baffle the most skilful cross examiner in the absence of accidents which are not so common in practice as [55] persons who take their notions on the subject from anecdotes or fiction would suppose.

Cannot be affected by rules of evidence.

No rules of evidence which the legislator can enact can perceptibly affect this difficulty. Judges must deal with it as well as they can by the use of their natural faculties and acquired experience, and the miscarriages of justice in which they will be involved by reason of it must be set down to the imperfection of our means of arriving at truth. The natural and acquired shrewdness and

facts which are asserted, and on the ground of such assertion believed by the Court to exist, to facts not asserted to exist and these I now proceed to examine

I have observed that the inference from an assertion to the truth of the matter asserted often is as easy as it always appears to be In very many instances which it is much easier to recognise when they occur than to reduce to rule a direct assertion even by a single witness of whom little is known is entitled to great weight Suppose for instance that the matter asserted is of a character indifferent in itself and upon which the witness is or for aught he can tell may be, open to contradiction A single assertion of this sort may outweigh a mass of artfully combined falsehood Suppose for instance that a number of witnesses have been called to prove an *alibi* and that they allege that on a given day they were all present together with the person on behalf of whom the *alibi* is to be proved at a fair held at a certain place If the Magistrate of the district, whose duty it was to superintend the fair were to depose that the fair did not begin to be held till a day subsequent to the one in question no one would doubt that the witnesses had conspired together to give false evidence by the familiar trick of changing the day In this case one direct assertion would outweigh many direct assertions Why? Because the Magistrate of the district would be a man of [61] character and position because he would (we must assume) be quite indifferent to the particular case in issue, because he would be deposing to a fact of which it would be his official duty to be cognizant and on which he could hardly be mistaken, and lastly because the fact would be known to a vast number of people and he would be open to contradiction, detection, and ruin if he spoke falsely Change these circumstances and the equally explicit testimony of the very same man might be worthless Suppose, for instance that he was asked whether he had committed adultery? His denial would carry hardly any weight in any conceivable case inasmuch as the charge is one which a guilty man would always deny and an innocent man could do no more In other words since the course of conduct supposed is one which a man would certainly take whether he were innocent or not the fact of his taking it would afford no criterion as to his guilt or innocence

Inference from assertion to truth sometimes really easy

Now in almost all judicial proceedings a certain number of facts are established by direct assertions made under such circumstances that no one would seriously doubt their truth Others are rendered probable in various degrees and thus the judge is furnished with facts which he may use as a basis for his inferences as to the existence of other facts which are either not asserted to exist, or are asserted to exist by unsatisfactory witnesses

These inferences are generally considered to be more difficult to draw than the inference from an assertion to the matter asserted In [62] fact it is far easier to combine materials supposed to be sound than to ascertain that they are sound In the one case no rules for the Judge's guidance can be laid down No process is gone through the correctness of which can afterwards be independently tested The Judge has nothing to trust to but his own natural and acquired sagacity In the other case all that is required is to go through a process with which as Mr Huxley remarks every one has a general superficial acquaintance tested by every day practice and the theory of which it is easy to understand and interesting to follow out and apply

Such inference comparatively easy

The facts supposed to be proved must ultimately fulfil the conditions of the method of difference but they may be combined by any of the recognised logical methods or by a combination of them all The object indeed, at which they are all directed is the same though they reach it by different roads A few illustrations will make this plain The question is whether *A* has embezzled a small sum of money say a particular rupee which he received on account of his employer and did not enter in a book in which he ought to have entered it His defence is that the omission to make the entry was accidental The acc

Facts must fulfil test of method of difference

be unexplained, and the fact that in all [illegible] instances consisting of [illegible] which have been made, each of which [illegible] in A's favour. This, in the absence of explanation, would leave no reasonable doubt of A's guilt in each and every case. It would be practically impossible to account for such facts except upon the supposition of [63] systematic fraud. Logically, this is an instance of the Method of Agreement applied to so great a number of instances as to exclude the operation of chance. When, however, this is done, the Method of Agreement becomes a case of the Method of Difference.

Converging probabilities.

The well-known cases in which guilt is inferred from a number of separate independent, and, so to speak, converging probabilities, may be regarded as an illustration of the same principle. Their general type is as follows:—

B was murdered by some one.

Whoever murdered *B* had a motive for his murder.

A had a motive for murdering *B*.

Whoever murdered *B* had an opportunity for murdering *B*.

A had an opportunity for murdering *B*.

Whoever murdered *B* made preparations for the murder of *B*.

A acted in a manner which might amount to a preparation for murdering *B*.

In each of these instances, which might of course be indefinitely multiplied, *one item of agreement* is established between the ascertained fact that *B* was murdered and the hypothesis that *A* murdered him, and it does sometimes happen that these *coincidences* may be multiplied to such an extent and may be of such a character as to exclude the supposition of chance, and justify the inference that *A* was guilty (1). The case, however, is a [64] rare one, and there is always *a great risk* of injustice unless the facts proved go beyond the mere multiplication of circumstances separately indicating guilt, and amount to a substantial exclusion of every reasonable possibility of innocence.

Illustrations.

The celebrated passage in Lord Macaulay's Essays in which he seeks to prove that Sir Philip Francis was the author of Junius's letters, is an instance of an argument of this kind. The letters, he says, show that five facts can be predicated of Junius, whoever he may have been. But these five facts may also be predicated of Sir Philip Francis and of no one else. Whether any part of this argument can in fact be sustained, is a question to which it would be impertinent to refer here, but that the method on which it proceeds is legitimate there can be no doubt.

Rules as to *corpus delicti*.

The cases in which it is most probable that injustice will be done by the application of the method of agreement to judicial inquiries are those in which the existence of the principal fact has to be inferred from circumstances pointing to it. This is the foundation of the well-known rule that the *corpus delicti* should not in general in criminal cases be inferred from other facts, but should be proved independently. It has been sometimes narrowed to the proposition that no one should be convicted of murder unless the body of the murdered person has been discovered. Neither of these rules is more than a rough and partial application of the general principle stated above. If the circumstances are [65] such as to make it morally certain (within the definition given above) that a crime has been committed, the inference that it was so committed is as safe as any other such inference.

Illustrations.

The captain of a ship, a thousand miles from any land, and with no other vessel in sight, is seen to run into his cabin, pursued by several mutinous sailors. The noise of a struggle and a splash are heard. The sailors soon afterwards come out of the cabin and take the command of the vessel. The cabin windows

(1) See *Aitchison's case*, p. 89 (i.e., 47 of this introduction).

are opened The cabin is in confusion, and the captain is never seen or heard of again

A person looks at his watch and returns it to his pocket Immediately afterwards a man comes past, and makes a snatch at the watch, which disappears. The man being pursued, runs away and swims across a river, he is arrested on the other side He has no watch in his possession and the watch is never found

In these cases it is morally certain that murder and theft respectively were committed, though in the first case the body, and in the second the watch is not producible

Existence of *corpus delicti* sometimes wrongly inferred

Cases, however, do undoubtedly occur in which the inference that a crime has been committed at all is a mistake They may often be resolved into a case of begging the question The process is this suspicion that a crime has been committed is excited, upon inquiry a number of circumstances are discovered which, if it is assumed that a crime has been committed, are suspicious, but which are not suspicious unless the assumption is made

[66] A ship is cast away under such circumstances that her loss may be accounted for either by fraud or by accident

The captain is tried for making away with her A variety of circumstances exist which would indicate preparation and expectation on his part if the ship really was made away with, but which would justify no suspicion at all if she was not It is manifestly illogical first to regard the antecedent circumstances as suspicious, because the loss of the ship is assumed to be fraudulent, and next to infer that the ship was fraudulently destroyed from the suspicious character of the antecedent circumstances This, however, is a fallacy of very common occurrence, both in judicial proceedings and in common life (1)

The modes in which facts may be so combined as to exclude every hypothesis other than the one which it is intended to establish are very numerous, and are, I think, better learnt from specific illustrations and from actual practice than from abstract theories One of the objects of the illustrations given in the next chapter is to enable students to understand this matter

The result of the foregoing inquiries may be summed up as follows —

Summary of conclusions

I In judicial inquiries the facts which form the materials for the decision of the court are the facts that certain persons assert certain things under certain circumstances **[67]** These facts the Judge hears with his own ears He also sees with his own eyes documents and other things respecting which he hears certain assertions

II His task is to infer—

(1) From what he himself hears and sees the existence of the facts asserted to exist,

(2) From the facts which on the strength of such assertions he believes to exist other facts which are not so asserted to exist

III Each of these inferences is an inference from the effect to the cause and each ought to conform to the Method of Difference that is to say the circumstances in each case should be such that the effect is inconsistent (subject to the limitations contained in the following paragraphs) with the existence of any other cause for it than the cause of which the existence is proposed to be proved

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(1) An illustration of this form of error occurred in the case of *R* v *Steward* and two others, who were convicted at Singapore in 1867 for casting away the Schooner *Erin* and subsequently received a free pardon on the ground of their innocence

In the event of Sir T Broughton's death, unmarried and without issue, the greater part of his fortune would descend to Mrs Donellan(1), but it was stated, though not proved, by the prisoner in his defence that he on his marriage *entered into articles for the immediate settling of her whole fortune on herself* and children, and deprived himself of the possibility of enjoying even a life-estate in **[76]** case of her death, and that the settlement extended not only to the fortune but to expectancies (2)

For some time before the death of Sir Theodosius the prisoner had on several occasions falsely represented his health to be very bad and his life to be precarious (3) On the 29th of August the apothecary in attendance sent him a mild and harmless draught to be taken the next morning (4) In the evening the deceased was out fishing(5), and the prisoner told his mother that he had been out with him, and that he had imprudently got his feet wet, both of which assertions were false (6) When Sir Theodosius was called on the following morning he was in good health(7), and about seven o'clock his mother went to his chamber to give him his draught(8), of which he immediately complained(9), and she remarked that it smelt like bitter almonds (10) **[77]** In about two minutes he struggled very much as if to keep the medicine down, and Lady Broughton observed a gurgling in his stomach(11), in ten minutes he seemed inclined to doze(11), but in five minutes afterwards she found him with his eyes fixed, his teeth clenched and froth running out of his mouth, and within half an hour after taking the dose he died (11)

Lady Broughton ran downstairs to give orders to a servant to go for the apothecary, who lived about three miles distant(12) and in less than five minutes after Sir Theodosius had been taken Donellan asked where the physic bottle was, and Lady Broughton showed him the two bottles The prisoner then took up one of them and said "Is this it?" and being answered "Yes," he poured some water out of the water bottle which was near into the phial shook it, and then emptied it into some dirty water which was in a wash hand basin Lady Broughton said, "You should not meddle with the bottle," upon which the prisoner snatched up the other bottle and poured water into that also and shook it, and then put his finger into it and tasted it Lady Broughton again asked what he was about, and said he ought not to meddle with the bottles on which he replied that he did it to taste it(13) though(14) he had not tasted the first bottle (13) The prisoner ordered a **[78]** servant to take away

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(1) Motive (section 8)

(2) Fact rebutting an inference suggested by a relevant fact (section 9) These facts are omitted by Mr Wills but are mentioned in my account of the case Gen View, Crim Law, p 338

(3) Facts showing preparation for fact in issue (section 8) The statements are also admissions as against the prisoner (section 17)

(4) A fact affording an opportunity for facts in issue (section 7)

(5) Introductory to what follows (section 9)

(6) Preparation (section 8) Admission (section 17)

(7) State of things under which facts in issue happened (section 7)

(8) It was suggested that Donellan changed the apothecary's draught for a poisoned one administered by Lady Broughton an innocent agent Therefore the administration of the draught suggested to be poisoned was a fact in issue (section 5)

(9) As to this *see* section 14

(10) *i e*, of prussic acid Lady Broughton perceived by smell the presence of the poison Therefore she smelt a fact in issue (section 5)

(11) Effects of facts in issue (section 7) All these facts go to make up the fact of his death which was a fact in issue

(12) Introductory to next fact as fixing the time (section 9)

(13) Subsequent conduct influenced by a fact in issue and statements explanatory of conduct (section 8)

(14) This word is Mr Wills' comment

the ba in, the dirty things and the bottles and put the bottles into her hands, for that purpose, she put them down again on being directed by Lady Broughton to do so but subsequently removed them on the peremptory order of the prisoner (1) On the arrival of the apothecary the prisoner said the deceased had been out the preceding evening fishing and had taken cold but he said nothing of the draught which he had taken (1) The prisoner had a still in his own room which he used for distilling roses(2) and a few days after the death of Sir Theodosius he brought it full of wet lime to one of the servants to be cleaned (3) The prisoner made several false and inconsistent statements to the servants as to the cause of the young man's death(1) and on the day of his death he wrote to Sir W Wheeler his guardian to inform him of the event but made no reference to its suddenness (4) The coffin was soldered up on the fourth day after the death (5) Two days afterwards Sir W Wheeler in consequence of the rumours which had reached him of the manner of Sir Theodosius's death and that suspicions were entertained that he had died from the effects of poison(6), wrote a letter to the prisoner requesting [79] that an examination might take place and mentioning the gentlemen by whom he wished it to be conducted (7) The prisoner accordingly sent for them but did not exhibit Sir W Wheeler's letter alluding to the suspicion that the deceased had been poisoned nor did he mention to them that they were sent for at his request Having been induced by the prisoner to suppose the case to be one of ordinary death(8), and finding the body in an advanced state of putrefaction the medical gentlemen declined to make the examination on the ground that it might be attended with personal danger On the following day a medical man who had heard of their refusal to examine the body offered to do so but the prisoner declined his offer on the ground that he had not been directed to send for him (9) On the same day the prisoner wrote to Sir W Wheeler a letter in which he stated that the medical men had fully satisfied the family and endeavoured to account [80] for the event by the ailment under which the deceased had been suffering, but he did not state that they had not made the examination (10) Three or four days after Sir W Wheeler having been informed that the body had not been examined(11) wrote to the prisoner insisting that it should be done(12) which, however he prevented by various disingenuous contrivances(13), and the body was interred without examination (14) In the meantime, the circumstances

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(1) Subsequent conduct and explanatory statements (section 8)

(2) Opportunity to distil laurel water, the poison said to have been used (section 7)

(3) Subsequent conduct (section 8)

(4) Admission, 17, 18

(5) Introductory to what follows (section 9)

(6) Introductory to and explanatory of what follows (section 9) It should be observed that proof of the rumours and suspicions for the purpose of showing the truth of the matters rumoured and suspected would not be admissible The fact that there were rumours and suspicions explains Sir W Wheeler's letter

(7) Statement to the prisoner and affecting his conduct (section 8 ex 2)

(8) Subsequent conduct of prisoner (section 8) and Mr Wills comment on the conduct

(9) Subsequent conduct (section 8) The fact that the first set of doctors refused explains the prisoner's conduct by showing that it had the effect of preventing examinations (section 7) The ground on which they refused tends to rebut this inference (section 9) but the second doctor's offer and the prisoner's conduct thereon tend to confirm it (section 9)

(10) Subsequent conduct (section 11) and admission (section 17)

(11) Introductory (section 9)

(12) Statement to the prisoner affecting his conduct (section 8 ex 2)

(13) Each contrivance and each circumstance which showed that it was disingenuous would come under the head of subsequent conduct (section 8)

(14) The burial was part of the transaction (section 6) The absence of examination

having become known to the coroner, he caused the body to be disinterred and examined on the eleventh day after death Putrefaction was found to be far advanced, and the head was not opened, nor the bowels examined, and in other respects the examination was incomplete (1) When Lady Broughton in giving evidence before the coroner's inquest, related the circumstance of the prisoner having rinsed the bottles, he was observed to take hold of her sleeve and endeavour to check her, and he afterwards told her that she had no occasion to have mentioned that circumstance, but only to answer such questions as were put to her, and in a letter to the coroner and jury he [81] endeavoured to impress them with the belief that the deceased had inadvertently poisoned himself with arsenic, which he had purchased to kill fish (2) Upon the trial four medical men—three physicians and an apothecary—were examined on the part of the prosecution, and expressed a very decided opinion mainly grounded upon the symptoms, the suddenness of the death, the *post-mortem* appearances, the smell of the draught as observed by Lady Broughton, and the similar effects produced by experiments upon animals, that the deceased had been poisoned with laurel water(3), one of them stating that on opening the body he had been affected with a biting acrimonious taste like that which affected him in all the subsequent experiments with laurel-water (4) An eminent(5) surgeon and anatomist stated a positive opinion that the symptoms did not necessarily lead to the conclusion that the deceased had been poisoned, and that the appearances presented upon dissection explained nothing but putrefaction (3) The prisoner was convicted and executed

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II

[82] Case of R v. Belaney.(6)

A surgeon named Belaney was tried at the Central Criminal Court, August 1844, before Mr Baron Gurney, for the murder of his wife They left their place of residence, at North Sunderland, on a journey of pleasure to London on the 1st of June (having a few days previously made mutual wills in each other's favour)(7), where on the 4th of that month they went into lodgings (8) The deceased, who was advanced in pregnancy, was slightly indisposed after the journey, but not sufficiently so to prevent her going about with her husband (9) On the 8th, being the Saturday morning after the arrival in town, the prisoner rang the bell for some hot water, a tumbler, and a spoon(10), and he and his wife were heard conversing in their chamber about seven o'clock About a quarter before eight the prisoner called the landlady upstairs, saying that his wife was very ill, and she found her lying motionless on the bed, with her eyes shut and her teeth closed, and foaming at the [83] mouth On being asked if she was subject to fits, the prisoner said she had fits before, but none like this,

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is explanatory of parts of the medical evidence The whole is introductory to medical evidence (section 9)

(1) Introductory to opinions of experts (sections 9, 45, 46)

(2) Subsequent conduct (section 8) and admissions (section 17)

(3) Opinion of experts (section 45)

(4) This is a case of testing a fact in issue, viz, the laurel water present in the body See definition of fact section 3

(5) This was the famous John Hunter

(6) Wills on "Circumstantial Evidence," pp 175—178

(7) Motive (section 8)

(8) Introductory (section 9)

(9) State of things under which fact in issue happened (section 7)

(10) Preparation (section 8)

and that she would not come out of it On being pressed to send for a doctor the prisoner said he was a doctor himself and should have let blood before, but there was no pulse On being further pressed to send for a doctor and his friends he assented, adding that she would not come to, that this was an affection of the heart and that her mother died in the same way nine months ago The servant was accordingly sent to fetch two of the prisoner's friends, and on her return she and the prisoner put the patient's feet and hands in warm water and applied a mustard plaster to her chest A medical man was sent for but before his arrival the patient had died (1) There was a tumbler close to the head of the bed about one third full of something clear, but whiter than water and there was also an empty tumbler on the other side of the table, and a paper of Epsom salt (2) In reply to a question from a medical man whether the deceased had taken any medicine that morning the prisoner stated that she had taken nothing but a little salts (3) On the same morning the prisoner ordered a grave for interment on the following Monday (4) In the [84] mean time the contents of the stomach were examined and found to contain prussic acid and Epsom salts It was deposed that the symptoms were similar to those of death by prussic acid, but might be the result of any powerful sedative poison and that the means resorted to by the prisoner were not likely to promote recovery but that cold effusion artificial respiration and the application of brandy or ammonia (which in the shape of smelling salts is found in every house) and other stimulants were the appropriate remedies and might probably have been effectual No smell of prussic acid had been discovered in the room though it has a very strong odour, but the window was open and it was stated that the odour is soon dissipated by a current of air (5) The prisoner had purchased prussic acid, as also acetate of morphine on the preceding day, from a vendor of medicines with whom he was intimate but he had been in the habit of using these poisons under advice for a complaint in the stomach (6) Two days after the fatal event the prisoner stated to the medical man who had been called in and who had assisted in the examination of the body, that on the morning in question he was about to take some prussic acid, that on endeavouring to remove the stopper he had [85] some difficulty, and used some force with the handle of a tooth brush, that in consequence of breaking the neck of the bottle by the force some of the acid was spilt, that he placed the remainder in the tumbler on the drawers at the end of the bed room, that he went into the front room to fetch a bottle wherein to place the acid, but instead of so doing began to write to his friends in the country, when in a few minutes he heard a scream from his wife's bed room, calling for cold water, and that the prussic acid was undoubtedly the cause of her death Upon being asked what he had done with the bottle, the prisoner said he had destroyed it, and on being asked why he had not mentioned the circumstances before, he said he had not done so because he was so distressed and ashamed at the consequence of his negligence To various persons in the north of England the prisoner wrote false and suspicious accounts of his wife's illness In one of them dated from the Euston Hotel on the 6th of June, he stated that his wife

(1) The death and attendant circumstances are facts in issue and part of the transaction (sections 5, 26) The other facts are conduct (section 8) and admissions (sections 17 18)

(2) State of things at death or cause or effect of administration of poison (section 7)

(3) Admissions (sections 17, 18)

(4) Conduct (section 8)

(5) Effect of poisoning (section 7), opinions of experts (sections 45 46) The absence of the smell of prussic acid and the presence of the draughts are respectively a fact suggesting the absence of prussic acid and a fact rebutting that inference (section 9)

(6) Preparation (section 8) and fact rebutting inference from purchase of poison (section 9)

was unwell, and that two medical men attended her, and that in consequence he should give up an intended visit to Holland, and intimated his apprehension of a miscarriage For these statements there was no foundation At that time moreover he had removed from the Euston Hotel into lodgings, and on the same day he had made arrangements for leaving his wife in London, and proceeding himself on his visit to Holland In another letter, dated 8th of June, and posted after his wife's death, though it could not be determined whether it was written before or after, the prisoner stated that [86] he had had his wife removed from the hotel to private lodgings, where she was dangerously ill and attended by two medical men, one of whom had pronounced her heart to be diseased, these representations were equally false In another letter, dated the 9th of June, but not posted until the 10th he stated the fact of his wife's death, but without any allusion to the cause, and in a subsequent letter he stated the reason for the suppression to be to conceal the shame and reproach of his negligence The prisoner's statements to his landlady that his wife's mother had died from disease of the heart was also a falsehood the prisoner having himself stated in writing to the registrar of burials that brain fever was the cause of death (1) It was however, proved that the prisoner was of a kind disposition, that he and his wife had lived upon affectionate terms and that he was extremely careless in his habits(2), and no motive for so horrible a deed was clearly made out, though it was urged that it was the desire of obtaining her property by means of her testamentary disposition (3) Upon the whole, though the case was to the last degree suspicious, it was certainly possible that an accident might have taken place in the way suggested, and the jury brought in a verdict of acquittal

Remarks in cases of Donellan and Belaney

The two cases of Donellan and Belaney are not merely curious in themselves, but throw light upon one of the most important of the [87] points connected with judicial evidence, the point namely as to the amount of uncertainty which constitutes what can be called reasonable doubt This I have already said is a question not of calculation, but of prudence The cases in question show that different tribunals at different times do not measure it in precisely the same way In Donellan's case the jury did not think the possibility that Sir Theodosius Broughton might have died of a fit sufficiently great to constitute reasonable doubt as to his having been poisoned In Belaney's case the jury thought that the possibility that the prisoner gave his wife the poison by accident did constitute a reasonable doubt as to his guilt If the chances of the guilt and innocence of the two men could be numerically expressed they would, I think, be as nearly as possible equal, and it might be said that both or that neither ought to have been convicted if it were not for the all important principle that every case is independent of every other, and that no decision upon facts forms a precedent for any other decision If two juries were to try the very same case upon the same evidence and with the same summing up and the same arguments by counsel they might very probably arrive at opposite conclusions and yet it might be impossible to say that either of them was wrong Of the moral qualifications for the office of a Judge few are more important than the strength of mind which is capable of admitting the unpleasant truth that it is often necessary to act upon probabilities, and to run some risk of error The cruelty of the old criminal law of Europe, and of [88] England as well as of other countries produced many bad effects one of which was that it intimidated those who had to put it in force The saying that it is better that ten criminals should escape than that one innocent man should be convicted expresses this sentiment, which has I think been carried too far, and has done much to enervate the administration of justice

(1) All these are admissions (sections 17, 18) and conduct (section 3)

(2) Character (section 53)

(3) Motive (section 8)

III.

[89] Case of R. v. Richardson.(1)

In the autumn of 1786 a young woman, who lived with her parents in a remote district in the Stewartry of Kirkcudbright(2) was one day left alone in the cottage(3), her parents having gone out to the harvest-field (4) On their return home a little after mid-day(2), *they found their daughter murdered(5)*, with her throat cut(6) in a most shocking manner.

The circumstances in which she was found, the character of the deceased, and the appearance of the wound, all concurred in excluding all supposition of suicide(7); while the surgeons who examined the wound were satisfied that [90] *it had been inflicted by a sharp instrument, and by a person who must have held the weapon in his left hand* (8) Upon opening the body the deceased appeared to have been some months gone with child(9) and on examining the ground about the cottage there were discovered the footsteps of a person who had seemingly been running hastily from the cottage by an indirect road through *a quagmire or bog, in which there were stepping-stones (10) It appeared*' however, that the person in his haste and confusion had slipped his foot and stepped into the mire, by which he must have been wet nearly to the middle of the leg.(11) The prints of the footsteps were accurately measured and an exact impression taken of them(12), and it appeared that they were those of a *person, who must have worn shoes, the soles of which had been newly mended*, and which, as is usual in that part of the country, had iron knobs or nails in them (12) There were discovered also along the track of the footsteps, and at certain intervals drops of blood, and on a stile or small gateway near the cottage, and in the line of the footsteps some marks resembling those of a hand which had been bloody.(12) Not the slightest suspicion at this time [91] attached to any particular person as the murderer, nor was it even suspected who might be the father of the child of which the girl was pregnant (13) At the funeral a number of persons of both sexes attended(14), and the steward-depute thought it the fittest opportunity of endeavouring if possible, to discover the murderer, conceiving rightly that, to avoid suspicion, whoever he was he would not on that occasion be absent (12) With this view he called together, after the interment, the whole of the men who were present, being about sixty in number (14) He caused the shoes of each of them to be taken off and

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(1) Wills, pp 225—229 Mr Wills observes "This case is also concisely stated in the 'Memoirs of the Life of Sir Walter Scott,' IV, p 52, and it supplied one of the most striking incidents in 'Guy Mannering.'"

(2) Introductory (section 9)

(3) Opportunity (section 7)

(4) Explanatory (section 9)

(5) Mr Wills' comment They found her with the throat cut, and Mr Wills says, she was murdered but her murder was to them an inference not a fact (section 3)

(6) Fact in issue (section 5)

(7) Suicide would be a relevant fact as being inconsistent with murder The facts which exclude suicide are relevant as inconsistent with a relevant fact (section 11)

(8) Opinion of experts (section 45)

(9) State of things under which death happened (section 7)

(10) *Effects of facts in issue (section 7)*

(11) This is so stated as to mix up inference and fact Stripped of inference the fact might have been stated thus — There were such marks in the bog as would have been produced if a person crossing the stepping stones had slipped with one foot The mud was of such a depth that a person so slipping would get wet to the middle of the leg

(12) Effects of fact in issue (section 7)

(13) Observation

(14) Introductory (section 9)

measured, and one of the shoes was found to resemble pretty nearly the impression of the footsteps near to the cottage The wearer of the shoe was the school master of the parish, which led to a suspicion that he must have been the father of the child, and had been guilty of the murder to save his character On a closer examination of the shoe, it was discovered that it was pointed at the toe, whereas the impression of the footstep was round at that place (1) The measurement of the rest went on, and after going through nearly the whole number one at length was discovered which corresponded exactly with the impression in dimensions, shape of the foot, form of the sole, and the number and position of the nails (2) William Richardson, the young man to [92] whom the shoe belonged, on being asked where he was the day deceased was murdered, replied, seemingly without embarrassment, that he had been all that day employed at his master's work(3),—a statement which his master and fellow servants who were present confirmed (4) This going so far to remove suspicions a warrant of commitment was not then granted, but some circumstances occurring a few days afterwards having a tendency to excite it anew, the young man was apprehended and lodged in jail (5) Upon his examination (6) he acknowledged that he was left handed(7), and some scratches being observed on his cheek, he said he had got them when pulling nuts in a wood a few days before (8) He still adhered to what [93] he had said of his having been on the day of the murder employed constantly in his master's work(9), but in the course of the inquiry it turned out that he had been absent from his work about half an hour, the time being distinctly ascertained, in the course of the forenoon of that day, that he called at a smith's shop under the pretence of wanting something which it did not appear that he had any occasion for, and that this smith's shop was in the way to the cottage of the deceased (9) A young girl, who was some hundred yards from the cottage, said that, about the time when the murder was committed (and which corresponded to the time when Richardson was absent from his fellow servants), she saw a person exactly with his dress and appearance running hastily towards the cottage, but did not see him return, though he might have gone round by a small eminence which would intercept him from her view, and which was the very track where the footsteps had been traced (10)

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(1) Irrelevant

(2) The making of the footmark was an effect of or conduct subsequent to and effected by, a fact in issue (section 7) The measurement of the sixty shoes of which one only corresponded exactly with the mark was a fact, or rather a set of facts making highly probable the relevant fact that that shoe made that mark (section 11) The experiment itself is an application of the method of difference This shoe would make the mark and no other of a very large number would

(3) This would be relevant against him, but not in his favour as an admission (sections 17, 18)

(4) The fact that his master and fellow servants confirmed his statement is irrelevant If they had testified afterwards to the fact itself it would have been relevant

(5) Irrelevant

(6) By Scotch law as well as by the Code of Criminal Procedure a prisoner may be examined

(7) The fact that he was left handed would be a cause of a fact in issue viz, the peculiar way in which the fatal wound was given The admission that he was left handed would be relevant as proof of the fact by sections 17 18

(8) If it was suggested that the scratches were made in a struggle with the girl, they would be an effect of a fact in issue (section 7) and the statement would be relevant as against the prisoner as an admission (sections 17, 18)

(9) Opportunity (section 7) Admissions (sections 17, 18) The call at the shop was preparation by making evidence (section 8) illustration (e)

(10) There is here a mixture of fact and inferences the girl could not know that a murder was committed at the time when it was committed Probably she mentioned the time, and it corresponded with the time when Richardson was away.

His fellow servants now recollected that on the forenoon of that day they were employed with Richardson in driving their master's cart, and that when passing by a wood which they named he said that he must run to the [94] smith's shop and would be back in a short time. He then left his cart under their charge, and having waited for him about half an hour, which one of the servants ascertained by having at the time looked at his watch, they remarked on his return that he had been absent a longer time than he said he would be, to which he replied that he had stopped in the wood to gather some nuts. They observed at the same time one of his stockings wet and soiled as if he had stepped in a puddle. He said he had stepped into a marsh, the name of which he mentioned, on which his fellow-servants remarked "that he must have been either mad or drunk if he stepped into that marsh, as there was a footpath which went along the side of it." It then appeared by comparing the time he was absent with the distance of the cottage from the place where he had left his fellow servants that he might have gone there, committed the murder and returned to them.(1) A search was then made for the stockings he had worn that day (2). They were found concealed in the thatch of the apartment where he slept, and appeared to be much soiled, and to have some drops of blood on them.(3) The fact he accounted for by saying first, that, his nose had been bleeding some days before, but it being observed that he wore other stockings on that day, he said he had assisted in bleeding a horse, but it was proved that he had not assisted [95] and had stood at such a distance that the blood could not have reached him (4). On examining the mud or sand upon the stockings, it appeared to correspond precisely with that of the mire or puddle adjoining the cottage, and which was of a very particular kind, none other of the same kind being found in that neighbourhood (5). The shoe maker was then discovered who had mended his shoes a short time before, and he spoke distinctly to the shoes of the prisoner which were exhibited to him as having been those he had mended (6). It then came out that Richardson had been acquainted with the deceased, who was considered in the country as of weak intellect, and had on one occasion been seen with her in a wood in circumstances that led to a suspicion that he had criminal intercourse with her, and on being taunted with having such connection with one in her situation, he seemed much ashamed and greatly [96] hurt (7). It was proved further

This would be preparation and opportunity (section 7). The existence of the small eminence explains her not seeing him return (section 9).

(1) All these facts are either opportunity or preparation or subsequent or previous conduct or admissions (sections 7, 8, 17).

(2) Introductory to next fact (section 9).

(3) The concealment is subsequent conduct (section 8). The state of the stockings is the effect of a fact in issue (section 7).

(4) The falsehoods are subsequent conduct (section 8) or admissions (sections 17 & 18). The prisoner's allegation about the horse is an allegation of a fact explaining the relevant fact that there was blood on the stockings (section 9) and the fact proved about his distance from the horse is a fact rebutting the inference suggested thereby that, the blood was the horse's (section 9).

(5) Effect of a fact in issue (section 7). The similarity of the sand on the stockings to the sand in the marsh was one of the effects of the slip which was the effect of the murder.

(6) That the marks were made by the prisoner's shoe was relevant as an effect of facts in issue. That the shoes which made the marks were the prisoner's had been already proved by their being found on his feet. This further proof seems superfluous unless it was suggested that they belonged to some one else.

(7) The opinion about her would be irrelevant. The fact that her intellect was weak would be part of the state of things under which the murder happened and with what follows would show motive (sections 7, 8).

by the person who sat next him when his shoes were measuring, that he trembled much and seemed a good deal agitated, and that, in the interval between that time and his being apprehended, he had been advised to fly, but his answer was, "Where can I fly to ?"(1)

On the other hand, evidence was brought to show that about the time of the murder a boat's crew from Ireland had landed on that part of the coast near to the dwelling of the deceased(2), and it was said that some of the crew might have committed the murder, though their motive for doing so it was difficult to explain, it not being alleged that robbery was their purpose, or that any thing was missing from the cottages in the neighbourhood The prisoner was convicted, confessed, and was hanged

s on - ase This case illustrates the application of what Mr Mill calls the method of agreement upon a scale which excludes the supposition of chance, thus —

(1) The murderer had a motive,—Richardson had a motive

(2) The murderer had an opportunity at a certain hour of a certain day in a certain place,—Richardson had an opportunity on that hour of that day at that place

[97] (3) The murderer was left handed,—Richardson was left-handed

(4) The murderer wore shoes which made certain marks,—Richardson wore shoes which made exactly similar marks

(5) If Richardson was the murderer and wore stockings, they must have been soiled with a peculiar kind of sand,—he did wear stocking which were soiled with that kind of sand

(6) If Richardson was the murderer, he would naturally conceal his stockings,—he did conceal his stockings

(7) The murderer would probably get blood on his clothes,—Richardson got blood on his clothes

(8) If Richardson was the murderer, he would probably tell lies about the blood,—he did tell lies about the blood

(9) If Richardson was the murderer, he must have been at the place at the time in question,—a man very like him was seen running towards the place at the time

(10) If Richardson was the murderer, he would probably tell lies about his proceedings during the time when the murder was committed —he told such lies

Here are ten separate marks, five of which must have been found in the murderer, one of which must have been found on the murderer if he wore stockings, whilst others probably would be found in him

All ten were found in Richardson Four of them were so distinctive that they could hardly have met in more than one man It is hardly imaginable that two left handed men, wearing precisely similar shoes and closely [98] resembling each other, should have put the same leg into the same hole of the same marsh at the same time that one of them should have committed a murder, and that the other should have causelessly hidden the stocking which had got soiled in the marsh Yet this would be the only possible supposition consistent with Richardson's innocence

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(1) Subsequent conduct (section 10) The weight of this is very slight

(2) Opportunity for the murder (section 7)

IV

[99] Case of R v Patch.(1)

A man named Patch had been received by Mr Isaac Blight, a ship-breaker, near Greenland Dock, into his service in the year 1803. Mr Blight having become embarrassed in his circumstances in July 1805 entered into a deed of composition with his creditors, and in consequence of the failure of this arrangement, he made a colourable transfer of his property to the prisoner (2) It was afterwards agreed between them that Mr Blight was to retire nominally from the business, which the prisoner was to manage, and the former was to have two-thirds of the profits, and the prisoner the remaining third, for which he was to pay £1,250 Of this amount, £250 was paid in cash, and a draft was given for the remainder upon a person named Goom, which would become payable on the 16th of September, the prisoner representing that he had received the purchase-money of an estate and lent it to Goom (3) On the 16th of September the prisoner represented to Mr Blight's bankers that Goom could not take [100] up the bill, and withdrew it, substituting his own draft upon Goom, to fall due on the 20th September (4) On the 19th of September the deceased went to visit his wife at Margate, and the prisoner accompanied him as far as Deptford(5), and then went to London and represented to his bankers that Goom would not be able to face his draft, but that he had obtained from him a note which satisfied him, and therefore they were not to present it (6) The prisoner boarded in Mr Blight's house, and the only other inmate was a female servant, whom the prisoner about eight o'clock the same evening (the 19th) sent out to procure some oysters for his supper (7) During her absence a gun or pistol ball was fired through the shutter of a parlour fronting the Thames, where the family, when at home, usually spent their evenings It was low water, and the mud was so deep that any person attempting to escape in that direction must have been suffocated and a man who was standing near the gate of the wharf, which was the only other mode of escape, heard the report, but saw no person (8) From the manner in which [101] the ball entered the shutter it was clear that it had been discharged by some person who was close to the shutter, and the river was so much below the level of the house that the ball if it had been fired from thence must have reached a much higher part than that which it struck The prisoner declined the offer of the neighbours to remain in the house with him that night (9) On the following day he wrote to inform the deceased of the transaction stating his hope that the shot had been accidental, that he knew of no person who had any animosity against him that he wished to know for whom it was intended, and that he should be happy to hear from him but much more so to see him (10)

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(1) Wills Circumstantial Evidence

(2) Introductory (section 9)

(3) Motive (section 8)

(4) Preparation (section 8)

(5) Introductory (section 9) but unimportant

(6) Preparation (section 8)

(7) Explains what follows (section 9) Preparation (section 8)

(8) The suggestion was that Patch fired the shot himself in order to make evidence in his own favour This would be preparation (section 8) Hence his firing the shot would be a relevant fact The facts in the text are facts which, taken together, make it highly probable that he did so, as they show that he and no one else had the opportunity and that it was done by some one (section 11)

The last fact illustrates the remarks made at pages, 37, 38 The inference from the facts stated assuming them to be true, is necessary, but, suppose that the "man standing near the gate" saw some one running and for reasons of his own denied it, how could he be contradicted ?

(9) Conduct (section 8)

(10) Preparation (section 8).

Mr Blight returned home on the 23rd September, having previously been to London to see his bankers on the subject of the £1,000 draft (1) Upon getting home the draft became the subject of conversation, and the deceased desired the prisoner to go to London, and not to return without the money (2) Upon his return the prisoner and the deceased spent the evening in the back parlour, a different one from that in which the family usually sat (3) About eight o'clock the prisoner went from the parlour into the kitchen, and asked [102] the servant for a candle(4), complaining that he was disordered (5) The prisoner's way from the kitchen was through an outer door which fastened by a spring lock, and across a paved court in front of the house which was enclosed by palisades, and through a gate over a wharf in front of that court, on which there was the kind of soil peculiar to premises for breaking up ships, and then through a counting house All of these doors, as well as the door of the parlour, the prisoner left open notwithstanding the state of alarm excited by the former shot The servant heard the privy door slam, and almost at the same moment saw the flash of a pistol at the door of the parlour where the deceased was sitting upon which she ran and shut the outer door and gate The prisoner immediately afterwards rapped loudly at the door for admittance with his clothes in disorder He evinced great apparent concern for Mr. Blight, who was mortally wounded and died on the following day From the state of the tide and from the testimony of various persons who were on the outside of the premises, no person could have escaped from them (6)

In consequence of this event Mrs Blight returned home(7), and the prisoner in answer to an inquiry about the draft [103] which had made her husband so uneasy, told her that it was paid, and claimed the whole of the property as his own (8) Suspicion soon fixed upon the prisoner(9), and in his sleeping room was found a pair of stockings rolled up like clean stockings, but with the feet plastered over with the sort of soil found on the wharf, and a ramrod was found in the privy (10) The prisoner usually wore boots, but on the evening of the murder he wore shoes and stockings (11) It was supposed that to prevent alarm to the deceased or the female servant, the murderer must have approached without his shoes, and afterwards gone on the wharf to throw away the pistol into the river (12) All the prisoner's statements as to his pecuniary transactions with Goom and his right to draw upon him, and the payment of the bill, turned out to be false (13) He attempted to tamper with the servant girl as to her evidence before the coroner, and urged her to keep to one account(14), and before that officer he made several inconsistent statements as to his

(1) Hardly relevant, except as introductory to what follows (section 9)

(2) Motive (section 8)

(3) State of things under which facts in issue happened (section 7)

(4) Preparation (section 8)

(5) Preparation (section 8)

(6) These facts collectively are inconsistent with the firing of the shot by anyone except Patch (section 11) They would also be relevant as being either facts in issue, or the state of things under which facts in issue happened (section 7) or as prepartion or opportunity (sections 7 & 8, illustration *h*)

(7) Introductory (section 9)

(8) Subsequent conduct influenced by a fact in issue (section 8)

(9) Irrelevant

(10) Effect of fact in issue (section 7)

(11) State of things under which facts in issue happened (section 7)

(12) Fact and inference are mixed up in this statement, the facts are (1) that the state of things was such that the deceased and his servant would have heard the steps of a man with shoes on under the window, and (2) that a person who wished to throw anything into the Thames would have to go on to the wharf

(13) Preparation (section 8)

(14) Subsequent conduct (section 8) and admission (sections 17 & 18)

pecuniary transactions with the deceased and equivocated much as to whether he wore [104] boots or shoes on the evening of the murder, as well as to the ownership of the soiled stockings(1), which however, were clearly proved to be his and for the soiled state of which he made no attempt to account (1) The prisoner suggested the existence of malicious feelings in two persons with whom the deceased had been on ill-terms(2), but they had no motive(3) for doing him any injury, and it was clearly proved that upon both occasions of attack they were at a distance (4)

Ren Patc case

Patch's case illustrates the method of difference(5) and the whole of it may be regarded as a very complete illustration of section 11 The general effect of the evidence is, that Patch had motive and opportunity for the murder, and that no one else, except himself could have fired either the shot which caused the murdered man's death, or the shot which was intended to show that the murdered man had enemies who wished to murder him The relevancy of the first shot arose from the suggestion that it was an act of preparation The proof that it was fired by Patch consisted of independent facts, showing that it was fired, and that he, and no one else, could have fired it The firing of the second shot by which the murder was committed was a fact in issue The proof of it by a strange [105] combination of circumstances was precisely similar in principle to the proof as to the first shot

The case is also very remarkable as showing the way in which the chain of cause and effect links together facts of the most dis-similar kind, and this proves that it is impossible to draw a line between relevant and irrelevant facts otherwise than by enumerating as completely as possible the more common forms in which the relation of cause and effects displays itself In Patch's case the firing of the first shot was an act of preparation by way of what is called "making evidence," but the fact that Patch fired it appeared from a combination of circumstances which showed that he might, and that no one else could have done so It is easy to conceive that some one of the facts necessary to complete this proof might have had to be proved in the same way For instance part of the proof that Patch fired the shot consisted in the fact that no one left certain premises by a certain gate, which was one of the suppositions necessary to be negatived in order to show that no one but Patch could have fired the shot The proof given of this was the evidence of a man standing near who said *that at the time in question no one did pass through the gate* in his presence, or could have done so unnoticed by him Suppose that the proof had been that the gate had not been used for a long time, that spiders webs had been spun all over the opening of the gate that they were unbroken at night and remained unbroken in the morning after the shot, and that it was impossible that they should have been spun after the shot was fired and [106] before the gate was examined In that case the proof would have stood thus —

Patch's preparations for the murder were relevant to the question whether he committed it Patch's firing the first shot was one of his preparations for the murder The facts inconsistent with his not having fired the shot were relevant to the question whether he fired it The fact that a certain door was not opened between certain hours was one of the facts which taken together, were inconsistent with his not having fired the shot The fact that a spider's web was whole overnight and also in the morning was inconsistent with the door having been opened

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(1) Effect of fact in issue (section 7)

(2) Motive (section 8)

(3) i e, no special motive beyond general ill will

(4) Facts inconsistent with relevant fact (section 11)

(5) P 30

Inversely the integrity of the spider's web was relevant to the opening of the door, the opening of the door was relevant to the firing of the first shot; the firing of the first shot was relevant to the firing of the second shot, and the firing of the second shot was a fact in issue, therefore the integrity of the spider's web was relevant to a fact in issue

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V.

[107] CASE OF R v. PALMER (1)

On the 14th of May, 1856, William Palmer was tried at the Old Bailey under powers conferred on the Court of Queen's Bench by 19 Vic, c 16, for the murder of John Parsons Cook at Rugeley, in Staffordshire The trial lasted twelve days, and ended on the 27th May, when the prisoner was convicted, and received sentence of death, on which he was afterwards executed at Stafford.

Palmer was a general medical practitioner at Rugeley, much engaged in sporting transactions Cook, his intimate friend, was also a sporting man, and after attending Shrewsbury races with him on the 13th November, 1855, returned in his company to Rugeley and died at the Talbot Arms Hotel, at that place, soon after midnight, on the 21st November, 1855, under circumstances which raised a suspicion that he had been poisoned by Palmer The case against Palmer was that he had a strong motive to murder his friend, and that his conduct before, at the time of, and after his death, coupled with the circumstances of the death itself, left no reasonable doubt [108] that he did murder him by poisoning him with antimony and strychnine administered on various occasions—the antimony probably being used as a preparation for the strychnine

The evidence stood as follows —At the time of Cook's death, Palmer was involved in bill transactions which appeared to have begun in the year 1853 His wife died in September, 1854, and on her death he received £13,000 on policies on her life, nearly the whole of which was applied to the discharge of his liabilities (2) In the course of the year 1855 he raised other large sums, amounting in all to £13,500, on what purported to be acceptances of his mother's The bills were renewed from time to time at enormous interest (usually sixty per cent per annum) by a money lender named Pratt, who, at the time of Cook's death, held eight bills—four on his own account and four on account of his client, two already overdue and six others *falling due*—some in *November* and others in January About £1,000 had been paid off in the course of the year, so that the total amount then due or shortly to fall due to Pratt, was £12 500 The only means which Palmer had by which these bills could be provided for was a policy on the life of his brother, Walter Palmer, for £13,000 Walter Palmer died in August, 1855(3) and William Palmer had instructed Pratt to recover the amount from the insurance office, but the office refused to pay In consequence of this difficulty, Pratt earnestly [109] pressed Palmer to pay something in order to keep down the interest or diminish the principal due on the bills He issued writs against him and his mother on the 6th November and informed him in substance that they would be served at once, unless he would pay something on account Shortly before the Shrewsbury

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(1) Reprinted from my "General View of the Criminal Law of England," p. 357

(2) A bill was found against him for her murder

(3) A bill was found against Palmer for his murder

races he had accordingly paid three sums, amounting in all to £800, of which £600 went in reduction of the principal, and £200 was deducted for interest It was understood that more money was to be raised as early as possible

Besides the money due to Pratt, Mr Wright of Birmingham held bills for £10,400 Part of these, amounting to £6,500, purporting to be accepted by Mrs Palmer, were collaterally secured by a bill of sale of the whole of William Palmer's property. These bills would fall due on the first or second week of November Mr Padwick also held a bill of the same kind for £2 000 on which £1,000 remained unpaid, and which was twelve months overdue on the 16th of October, 1855 Palmer, on the 12th November, had given Espin a cheque ante-dated on the 28th November, for the other £1,000 Mrs Sarah Palmer's acceptance was on nearly all these bills, and in every instance was forged

The result is that about the time of the Shrewsbury races, Palmer was being pressed for payment on forged acceptances to the amount of nearly £20 000 and that his only resources were a certain amount of personal property, over which Wright held a bill of sale, and a policy for £13 000, the payment of which was refused by the [110] office Should he succeed in obtaining payment he might no doubt struggle through his difficulties, but there still remained the £1 000 ante-dated cheque given to Espin, which it was necessary to provide for at once by some means or other That he had no funds to his own was proved by the fact that his balance at the bank on the 19th November was £9, 6*s* , and that he had to borrow £25 of a farmer named Walbank, to go to Shrewsbury races It follows that he was under the most pressing necessity to obtain a considerable sum of money, as even a short delay in obtaining it might involve him not only in insolvency, but in a prosecution for uttering forged acceptances

Besides the embarrassment arising from the bills in the hands of Pratt Wright and Padwick, Palmer was involved in a transaction with Cook, which had a bearing on the rest of the case Cook and he were parties to a bill for £500 which Pratt had discounted, giving £365 in cash and a wine warrant for £65, and charging £60 for discount and expenses He also required an assignment of two race-horses of Cook's—Pole-Star and Sirius—as a collateral security By Palmer's request the £365 in the shape of a cheque payable to Cook's order and the wine warrant, were sent by post to Palmer at Doncaster Palmer wrote Cook's endorsement on the cheque, and paid the amount to his own credit at the Bank at Rugeley On the part of the prosecution it was said that this transaction afforded a reason why Palmer should desire to be rid of Cook, inasmuch as it amounted to a forgery by which [111] Cook was defrauded of £375 It appeared however on the other side that there were £300 worth of notes relating to some other transaction in the letter which enclosed the cheque , and as it did not appear that Cook had complained of getting no consideration for his acceptance, it was suggested that he had authorized Palmer to write his name on the back of the cheque and had taken the notes himself This arrangement seems not improbable as it would otherwise be hard to explain why Cook acquiesced in receiving nothing for his acceptance, and there was evidence that he meant to provide for the bill when it became due It also appeared later in the case that there was another bill for £500, in which Cook and Palmer were jointly interested (1)

Such was Palmer's position when he went to Shrewsbury races on Monday, the 12th November, 1855 Cook was there also , and on Tuesday the 13th his mare Pole-Star won the Shrewsbury Handicap, by which he became entitled to the stakes, worth about £380 and bets to the amount of nearly £2 000 Of these bets he received £700 or £800 on the course at Shrewsbury The rest was to be paid at Tattersall's on the following Monday the 19th November (1)

(1) All these facts go to show motive (section 8)

After the race Cook invited some of his friends to dinner at the Raven Hotel, and on the occasion and on the following day he was both sober and well (1) On the Wednesday night a man named Ishmael Fisher came into the sitting room, which Palmer shared with Cook, and [112] found them in company with some other men drinking brandy and water Cook complained that the brandy "burned his throat dreadfully," and put down his glass with a small quantity remaining in it Palmer drank up what was left, and, handing the glass to Read asked him if he thought there was anything in it, to which Read replied "What's the use of handing me the glass when it's empty?" Cook shortly afterwards left the room, called out Fisher and told him that he had been very sick, and, "He thought that dammed Palmer had dosed him" He also handed over to Fisher £700 or £800 in notes to keep for him (2) He then became sick again, and was ill all night, and had to be attended by a doctor He told the doctor, Mr Gibson, that he thought he had been poisoned, and he was treated on that supposition (3) Next day Palmer told Fisher that Cook had said that he (Palmer) had been putting something into his brandy He added that he did not play such tricks with people, and that Cook had been drunk the night before—which appeared not to be the case (4) Fisher did not expressly say that he returned the money [113] to Cook but from the course of the evidence it seems that the did(5), for Cook asked him to pay Pratt £200 at once, and to repay himself on the following Monday out of the bets which he would receive on Cook's account at the settling at Tattersall's

About half-past ten on the Wednesday, and apparently shortly before Cook drank the brandy and water which he complained of, Palmer was seen by a Mrs Brooks in the passage looking at a glass lamp, through a tumbler which contained some clear fluid like water, and which he was shaking and turning in his hand There appears, however, to have been no secrecy in this, as he spoke to Mrs Brooks and continued to hold and shake the tumbler as he did so (6) George Myatt was called to contradict this for the prisoner He said that he was in the room when Palmer and Cook came in, that Cook made a remark about the brandy, though he gave a different version of it from Fisher and Read, that he did not see anything put in it, and that if anything had been put in it he should have seen He also swore that Palmer never left the room from the time he came in till Cook went to bed He also put the time later than Fisher and Read (7) All this, however, came to very little It was the sort of difference which always arises in the details of evidence As Myatt was a friend of Palmer's he probably remembered the matter (perhaps honestly enough) in a way more favourable to him than the other witnesses

[114] It appeared from the evidence of Mrs Brooks and also from that of a man named Herring, that other persons besides Cook were taken ill at Shrewsbury, on the evening in question, with similar symptoms Mrs Brooks said, "We made an observation we thought the water might have been poisoned in Shrewsbury," Palmer himself vomited on his way back to Rugeley according to Myatt (8)

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(1) State of things under which the following facts occurred (section 7)

(2) Conduct of person against whom offence was committed and statement explanatory of such conduct (section 8 exp 1)

(3) The administration of antimony by Palmer would be a fact in issue, as being one of a set of acts of poisoning which finally caused Cook's death Cook's feelings were relevant as the effect of his being poisoned (section 7) and his statement as to them was relevant under section 14 as a statement showing the existence of a relevant bodily feeling

(4) Admission (sections 17, 18)

(5) Motive (section 8)

(6) Preparation (section 8)

(7) Evidence against last fact (section 5)

(8) Facts rebutting inference suggested by preceding fact (section 9)

The evidence as to what passed at Shrewsbury clearly proves that Palmer being then in great want of money, Cook was to his knowledge in possession of £700 or £800 in bank-notes, and was also entitled to receive on the following Monday about £1,400 more It also shows that Palmer may have given him a dose of antimony, though the weight of the evidence to this effect is weakened by the proof that diarrhœa and vomiting were prevalent in Shrewsbury at the time It is, however, important in connection with subsequent events

On Thursday, November 15th, Palmer and Cook returned together to Rugeley, which they reached about ten at night. Cook went to the Talbot Arms, and Palmer to his own house immediately opposite Cook still complained of being unwell On the Friday he dined with Palmer in company with an attorney, Mr Jeremiah Smith, and returned perfectly sober about ten in the evening (1) At eight on the following morning (November 17th) Palmer came over, and ordered a cup of **[115]** coffee for him The coffee was given to Cook by Mills, the chambermaid, in Palmer's presence When she next went to his room, an hour or two afterwards, it has been vomited (1) In the course of the day, and apparently about the middle of the day, Palmer sent a charwoman, named Rowley, to get some broth for Cook at an inn called the *Albion* She brought it to Palmer's house, put it by the fire to warm, and left the room Soon after, Palmer brought it out, poured it into a cup and sent it to the Talbot Arms with a message that it came from Mr Jeremiah Smith. The broth was given to Cook, who at first refused to take it, Palmer, however, came in, and said he must have it The chambermaid brought back the broth which she had taken downstairs and left it in the room It also was thrown up (2) In the course of the afternoon Palmer called in Mr. Bamford, a surgeon, eighty years of age to see Cook, and told him that when Cook dined at his (Palmer's) house he had taken too much champagne (3) Mr Bramford, however, found no bilious symptoms about him, and he said he had only drunk two glasses (4) On the Saturday night Mr Jeremiah Smith slept in Cook's room, as he was still ill One the Sunday, between twelve and one, Palmer sent over his gardener, **[116]** Hawley, with some more broth for Cook (5) Elizabeth Mills, the servant at the Talbot Arms, tasted it, taking two or three spoonfuls She became exceedingly sick about half an hour afterwards, and vomited till 5 o'clock in the afternoon She was so ill that she had to go to bed This broth was also taken to Cook, and the cup afterwards returned to Palmer It appears to have been taken and vomited, though the evidence is not quite explicit on that point (6) By the Sunday's post Palmer wrote to Mr Jones, an apothecary and Cook's most intimate friend, to come and see him He said that Cook was " confined to his bed with a severe bilious attack combined with diarrhœa " The servant Mills said there was no diarrhœa (7) It was observed on the part of the defence that this letter was strong proof of innocence The prosecution suggested that it was "part of a deep design, and was meant to make evidence in the prisoner's favour " The fair conculsion seems to be that it was an ambiguous act which ought to weigh neither

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(1) Introductory to what follows (section 9), and shows state of things under which following facts occurred (section 7)

(2) Fact in issue and its effect as this was an act of poisoning (section 5)

(3) Conduct and statements explaining conduct (section 8)

(4) Rebuts inference in Palmer's favour suggested by preceding fact and explains the object of his conduct by showing that his statement was false (section 9) Cook's statement relates to his state of body (section 14)

(5) Fact in issue—administration of poisons (section 5)

(6) Effect of facts in issue (section 7)

(7) Conduct (section 8) and explanation of it (section 9)

way, though the falsehood about Cook's symptoms is suspicious as far as it goes

On the night between Sunday and Monday Cook had some sort of attack When the servant Mills went into his room on the Monday he said, "I was just mad for two minutes" She said, "Why did you not ring the bell?" He said, "I thought that you would be all fast asleep, [117] and not hear it" He also said he was disturbed by a quarrel in the street It might have waked and disturbed him, but he was not sure This incident was not mentioned at first by Barnes and Mills, but was brought out on their being re called at the request of the prisoner's counsel It was considered important for the defence, as proving that Cook had had an attack of some kind before it was suggested that any strychnine was administered, and the principal medical witness for the defence, Mr Nunneley, referred to it, with this view (1)

On the Monday, about a quarter-past or half past seven, Palmer again visited Cook, but as he was in London about half past two, he must have gone to town by an early train During the whole of the Monday Cook was much better He dressed himself, saw a jockey and his trainer, and the sickness ceased (2)

In the meantime Palmer was in London He met by appointment a man named Herring who was connected with the turf Palmer told him he wished to settle Cook's account and read to him from a list, which Herring copied as Palmer read it, the particulars of the bets which he was to receive They amounted to £984 clear Of this sum Palmer instructed Herring to pay £450 to Pratt and £350 to Padwick The nature of the debt to Padwick was not proved in evidence, as Padwick himself was not called Palmer told Herring [118] the £450 was to settle the bill for which Cook had assigned his horses He wrote Pratt on the same day a letter in these words,—Dear Sir —You will place the £50 I have just paid you, and the £450 you will receive from Mr Herring together £500, and the £200 you received on Saturday" (from Fisher) "towards payment of my mother's acceptance for £2,000, due 25th October"(3)

Herring received upwards of £800, and paid part of it away according to Palmer's directions Pratt gave Palmer credit for the £450, but the £350 was not paid to Padwick, according to Palmer's directions, as part was retained by Mr Herring for some debts due from Cook to him, and Herring received less than he expected In his reply the Attorney-General said that the £350 intended to be paid to Padwick was on account of a bet, and suggested that the motive was to keep Padwick quiet as to the ante-dated cheque for £1,000 given to Espin on Padwick's account There was no evidence of this, and it is not of much importance It was clearly intended to be paid to Padwick on account not of Cook (except possibly as to a small part), but of Palmer Palmer thus disposed, or attempted to dispose, in the course of Monday, November 19th, of the whole of Cook's winnings for his own advantage (4)

This is a convenient place to mention the final result of the transaction relating to the bill for £500, in which Cook and Palmer were jointly interested On the Friday [119] when Cook and Palmer dined together (November 16th) Cook wrote to Fisher (his agent) in these words —"It is of very great importance to both Palmer and myself that a sum of £500 should be paid to

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(1) Fact tending to rebut inference from previous fact (section 9)

(2) Supports the inference suggested by the previous fact that Palmer's doses caused Cook's illness (section 9)

(3) Conduct and statement explanatory thereof (section 8 ex 2)

(4) All this is Palmer's conduct and is explanatory of it (sections 7, 9)

a Mr. Pratt of 5 Queen Street, Mayfair, 300*l* *has been sent up to night*, and if you would be kind enough to pay the other £200 to-morrow, on the receipt of this, you will greatly oblige me I will settle it on Monday at Tattersall's" Fisher did pay the £200, expecting, as he said, to settle Cook's account on the Monday, and repay himself On the Saturday, November 17th (the day after the date of the letter), "a person," said Partt, "whose name I did not know, called on me with a cheque, and paid me 300*l*) on account of *the prisoner;* that" (apparently the cheque, not the 300*l*) "was a cheque of Mr. Fisher's" When Pratt heard of Cook's death he wrote to Palmer, saying "The death of Mr. Cook will now compel you to look about as to the payment of the bill for £500 due the 2nd of December "(1)

Great use was made of these letters by the defence It was argued that they proved that Cook was helping Palmer, and was eager to relieve him from the pressure put on him by Pratt, that in consequence of this he not only took up the £500 bill, but authorized Palmer to apply the £800 to similar purposes and to get the amount settled by Herring, instead of Fisher, so that Fisher might not stop out of it the £200 which he had advanced to Pratt, it was asked how it could be [120] Palmer's interest, on this supposition, that Cook should die, especially as the first consequence of his death was Pratt's application for the money due on the £500 bill.

These arguments were, no doubt, plausible, and the fact that Cook's death compelled Pratt to look to Palmer for the payment of the £500 lends them weight, but it may be asked, on the other hand, why should Cook give away the whole of his winnings to Palmer? Why should Cook allow Palmer to appropriate to the diminution of his own liabilities the £200 which Fisher had advanced to the credit of the bill on which both were liable? Why should he join with Palmer in a plan for defrauding Fisher of his security for this advance? No answer to any of these questions was suggested As to the £300, Cook's letter to Fisher says, "£300 *has been* sent up this evening" There was evidence that Pratt never received it, for he applied to Palmer for the money on Cook's death Moreover, Pratt said that on the Saturday he did receive £300 *on account of Palmer*, which he placed to the account of the forged acceptance for £2,000 Where did Palmer get the money? The suggestion of the prosecution was that Cook gave it him to pay to Pratt on account of their joint bill, and that he paid it on his own account This was probably the true view of the case The observation that Pratt, on hearing of Cook's death, applied to Palmer to pay the £500 bill is met by the reflection that that bill was genuine, and collaterally secured by the assignment of the racehorses, and that the other bill bore a forged acceptance, and must be satisfied at all hazards [121] The result is that on the Monday evening Palmer had the most imperious interest in Cook's death, for he had robbed him of all he had in the world, except the equity of redemption in his two horses

On Monday evening (November 19th) Palmer returned to Rugeley, and went to the shop of Mr Salt, a surgeon there, about nine P M He saw Newton, Salt's assistant, and asked him for three grains of strychnine, which were accordingly given him (2) Newton never mentioned this transaction till a day or two before his examination as a witness in London, though he was examined on the inquest He explained this by saying that there had been a quarrel between Palmer and Salt, his (Newton's) master, and that he thought Salt would be displeased with him for having given Palmer anything No doubt the concealment was improper, but nothing appeared on cross-examination to suggest that the witness was wilfully perjured

(1) Motive for not poisoning Cook (section 8)

(2) Preparation (section 8)

Cook had been much better throughout Monday, and on Monday evening Mr. Bamford, who was attending him, brought some pills for him, which he left at the hotel They contained neither antimony nor strychnine They were taken up in the box in which they came to Cook's room by the chambermaid and were left there on the dressing table about eight o'clock Palmer came (according to Barnes the waitress) between eight and nine, and Mills said she saw him sitting by the fire between nine and ten (1)

[122] If this evidence were believed, he would have had an opportunity of substituting poisoned pills for those sent by Mr Bamford just after he had, according to Newton, procured strychnine The evidence, however, was contradicted by a witness called for the prisoner, Jeremiah Smith the attorney He said that on the Monday evening, about ten minutes past ten, he saw Palmer coming in a car from the direction of Stafford, that they went up to Cook's room together, stayed two or three minutes, and went with Smith to the house of old Mrs Palmer, his mother Cook said "Bamford sent him some pills, and he had taken them, and Palmer was late, intimating that he should not have taken them if he had thought Palmer would have called in before" If this evidence were believed it would of course have proved that Cook took the pills which Bamford sent as he sent them (2) Smith however, was cross examined by the Attorney General at great length He admitted with the greatest reluctance that he had witnessed the assignment of a policy for £13,000 by Walter to William Palmer, that he wrote to an office to effect an insurance for £10 000 on the life of Bates, who was Palmer's groom, at £1 a week, that he tried after Walter Palmer's death to get his widow to give up her claim on the policy, that he was applied to to attest other proposals for insurances on Walter Palmer's life for similar amounts, and that he had got a cheque for £5 for attesting the assignment (3)

[123] Lord Campbell said of this witness in summing up, "Can you believe a man who so disgraces himself in the witness box? It is for you to say what faith you can place in a witness, who, by his own admission, engaged in such fraudulent proceedings"

It is curious that though the credit of this witness was so much shaken in cross-examination, and though he was contradicted both by Mills and Newton, he must have been right and they wrong as to the time when Palmer came down to Rugeley that evening Mr Mathews, the inspector of police at the Euston station, proved that the only train by which Palmer could have left London after half past two (when he met Herring) started at five, and reached Stafford on the night in question at a quarter to nine It is about ten miles from Stafford to Rugeley, so that he could not have got across by the road in much less than an hour(4), yet Newton said he saw him "about nine", and Mills saw him "between nine and ten" Nothing, however is more difficult than to speak accurately to time, on the other hand, if Smith spoke the truth Newton could not have seen him at all that night and Mills, if at all, must have seen him for a moment only in Smith's company Mills never mentioned Smith, and Smith would not venture to swear that she or any one else saw him at the Talbot Arms It was a suspicious circumstance that Serjeant Shee did not open Smith's evidence to the jury An opportunity for perjury was afforded by **[124]** the mistake made by the witnesses as to the time, which the defence were able to prove by the

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(1) Opportunity The rest is introductory (sections 7, 9)

(2) Evidence against the existence of the fact last mentioned (section 5)

(3) The cross-examination tended to test the veracity of the witness and to test his credit (section 146)

(4) Facts inconsistent with a relevant fact (section 11), and fixing the time of the occurrence of a relevant fact (section 9)

evidence of the police inspector If Smith were disposed to tell an untruth, the knowledge of this fact would enable him to do so with an appearance of plausibility

Whatever view is taken as to the effect of this evidence it was clearly proved that about the middle of the night between Monday and Tuesday Cook had a violent attack of some sort About twelve or a little before, his bell rang, he screamed violently When Mills, the servant came in he was sitting up in bed, and asked that Palmer might be fetched at once He was beating the bed clothes, he said he should suffocate if he lay down His head and neck and his whole body jumped and jerked He had great difficulty in breathing, and his eyes protruded His hand was stiff, and he asked to have it rubbed Palmer came in, and gave him a draught and some pills He snapped at the glass, and got both it and the spoon between his teeth He had also great difficulty in swallowing the pills After this he got more easy, and Palmer stayed by him some time, sleeping in an easy chair (1)

Great efforts were made in cross examination to shake the evidence of Mills by showing that she had altered the evidence which she gave before the coroner, so as to make her description of the symptoms tally with those of poisoning by strychnine, and also by showing that she had been drilled as to the evidence which she was to give by [125] persons connected with the prosecution She denied most of the suggestions conveyed by the questions asked her and explained others (2) As to the differences between her evidence before the coroner and at the trial, a witness (Mr Gardner an attorney) was called to show that the depositions were not properly taken at the inquest (3)

On the following day, Tuesday, the 20th, Cook was a good deal better In the middle of the day he sent the boots to ask Palmer if he might have a cup of coffee Palmer said he might, and came over, tasted a cup made by the servant, and took it from her hands to give it to Cook This coffee was afterwards thrown up (4)

A little before or after this, the exact hour is not important, Palmer went to the shop of Hawkins, a druggist at Rugeley, and was there served by his apprentice Roberts with two drachms of prussic acid six grains of strychnine and two drachms of Batley's Sedative (5) Whilst he was making the purchase, Newton from whom he had obtained the other strychnine the night before, came in, Palmer took him to the door, saying he wished to speak to him, [126] and when he was there asked him a question about the firm of a Mr Edwin Salt—a matter with which he had nothing at all to do Whilst they were there a third person came up and spoke to Newton on which Palmer went back into Hawkins' shop and took away the things, Newton not seeing what he took The obvious suggestion upon this is that Palmer wanted to prevent Newton from seeing what he was about No attempt even was made to shake, or in any way discredit, Roberts the apprentice (6)

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(1) Effect of fact in issue, as the administration of poison (section 7)

(2) Former statements inconsistent with evidence (section 153)

(3) The depositions before the coroner would be a proper mode of proof as being a record of a relevant fact made by a public servant in the discharge of his official duty (section 35) and any document purporting to be such a deposition would on production be presumed to be genuine and the evidence would be presumed to be duly taken (sections 79 and 80) but this might be rebutted (section (4) definition of shall presume)

(4) Part of the transaction of poisoning (section 8)

(5) Preparation (section 8)

(6) Conduct (section 8)

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and the fingers of one hand were very stiff, the hand being clenched. This was about one A.M., half or three quarters of an hour after the death (1).

[129] As soon as Cook was dead, Jones went out to speak to the housekeeper, leaving Palmer alone with the body. When Jones left the room he sent the servant Mills in, and she saw Palmer searching the pockets of Cook's coat and searching also under the pillow and bolster. Jones shortly afterwards returned, and Palmer told him that as Cook's nearest friend, he (Jones) ought to take possession of his property. He accordingly took possession of his watch and purse, containing five sovereigns and five shillings. He found no other money. Palmer said, "Mr. Cook's death is a bad thing for me, as I am responsible for £3,000 or £4,000, and I hope Mr. Cook's friends will not let me lose it. If they do not assist me, all my horses will be seized." The betting book was mentioned. Palmer said, "It will be no use to any one," and added that it would probably be found (2).

On Wednesday, the 21st instant, Mr. Wetherby, the London racing agent, who kept a sort of bank for sporting men, received from Palmer a letter enclosing a cheque for £350 against the amount of the Shrewsbury stakes (£381) which Wetherby was to receive for him. This cheque had been drawn on the Tuesday, about seven o'clock in the evening, under peculiar circumstances. Palmer sent for Mr. Cheshire, the postmaster at Rugeley, telling him to bring a receipt stamp, and when he arrived asked him to write out, from a copy which he produced, a cheque by Cook, on Wetherby. He said it was for money which Cook owed him, and that he was going to take it [130] over for Cook to sign. Cheshire wrote out the body of the cheque, and Palmer took it away. When Mr. Wetherby received the cheque, the stakes had not been paid to Cook's credit. He accordingly returned the cheque to Palmer, to whom the prosecution gave notice to produce it at the trial (3). It was called for but not produced (4). This was one of the strongest facts against Palmer in the whole of the case. If he had produced the cheque, and if it had appeared to have been really signed by Cook, it would have shown that Cook for some reason or other had made over his stakes to Palmer, and this would have destroyed the strong presumption arising from Palmer's appropriation of the bets to his own purposes. In fact it would have greatly weakened and almost upset the case as to the motive. On the other hand, the non-production of the cheque amounted to an admission that it was a forgery, and if that were so Palmer was forging his friend's name for the purpose of stealing his stakes at the time when to all outward appearance there was every prospect of his speedy recovery, which must result in the detection of the fraud. If he knew that Cook would die that night this was natural. On any other supposition it was inconceivable rashness (5).

Either on Thursday 22nd or Friday, 23rd, Palmer sent for Cheshire again and produced a paper which he [131] said Cook had given to him some days before. The paper purported to be an acknowledgment that certain bills—the particulars of which were stated—were all for Cook's benefit and not for Palmer. The amount was considerable, as at least one item was for £1,000 and another for £500. This document purported to be signed by Cook, and Palmer wished Cheshire to attest Cook's execution of it, which he refused to do. This document was called for at the trial and not produced. The same observations apply to it as to the cheque (6).

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(1) Cook's death in all its detail was a fact in issue (section 5).

(2) Conduct (section 8).

(3) Conduct (section 8).

(4) *See* section 66 as to notice to produce.

(5) As to these inferences see section 114, illust. (*g*).

(6) Conduct (section 8). See section 66 as to notice to produce. As to these inferences see section 114, illust. (*g*).

contraction of the respiratory muscles" It was not suggested that this memorandum was made for any particular purpose It was used merely to show that Palmer was acquainted with the properties and effects of strychnine (1)

This completes the evidence as to Palmer's behaviour before, at and after the death of Cook It proves beyond all question that, having the strongest possible motive to obtain at once a considerable sum of money, he robbed his friend of the whole of the bets paid to Herring on the Monday by a series of ingenious devices, and that he tried to rob him of the stakes, it raises the strongest presumption that he robbed Cook of the £300 which, as Cook supposed, was sent up to Pratt on the 16th, and that he stole the money which he had on his person and had received at Shrewsbury, it proves that he forged his name the night before he died, and that he tried to procure a fraudulent attestation to [137] another forged document relating to his affairs the day after he died It also proves that he had every opportunity of administering poison to Cook, that he told repeated lies about his state of health, and that he purchased *deadly poison for which he had no lawful use, on two separate occasions shortly* before two paroxysms of a similar character to each other, the second of which deprived him of life

The rest of the evidence was directed to prove that the symptoms of which Cook died were those of poisoning by strychnine, and that antimony which was never prescribed for him, was found in his body Evidence was also given in the course of the trial as to the stage of Cook's health

At the time of his death Cook was about twenty eight years of age Both his father and mother died young, and his sister and half brother were not robust He inherited from his father about £12 000 and was articled to a solicitor Instead of following up that profession he betook himself to sporting pursuits, and appears to have led a rather dissipated life He suffered from syphilis, and was in the habit of occasionally consulting Dr Savage on the state of his health Dr Savage saw him in November 1854, in May, in June, towards the end of October, and again early in November 1855, about a fort-night before his death, so that he had ample means of giving satisfactory evidence on the subject, especially as he examined him carefully whenever he came Dr Savage said that he had two shallow ulcers on the tongue corresponding to bad teeth, that he had also a sore throat, one of his tonsils [138] being very large red, and tender, and the other very small Cook himself was afraid that these symptoms were syphilitic, but Dr Savage thought decidedly that they were not He also noticed "an indication of pulmonary affection under the left lung" Wishing to get him away from his turf associates, Dr Savage recommended him to go abroad for the winter His general health Dr Savage considered good for a man who was not robust Mr Stephens said that when he last saw him alive he was looking better than he had looked for some time, and on his remarking "You do not look anything of an invalid now," Cook struck himself on the breast and said he was quite well His friend, Mr Jones, also said that his health was generally good, though he was not very robust, and that he both hunted and played at cricket (2)

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(1) Fact showing knowledge (section 14)

(2) Conduct and facts introductory thereto (sections 8, 9)

months, and now he did not take notice of it." This was certainly not consistent with Dr. Savage's evidence (1)

Such being the state of health of Cook at the time of his [139] death, the next question was as to its cause The prosecution contended that the symptoms which attended it proved that he was poisoned by strychnia Several eminent physicians and surgeons—Mr Curling, Dr. Todd, Sir Benjamin Brodie, Mr Daniel, and Mr Solly—gave an account of the general character and causes of the disease of tetanus Mr Curling said that tetanus consists of spasmodic affection of the voluntary muscles of the body which at last ends in death, produced either by suffocation caused by the closing of the windpipe or by the wearing effect of the severe and painful struggles which the muscular spasms produce. Of this disease there are three forms—idiopathic tatanus, which is produced wthout any assignable external cause, traumatic tetanus, which results from wounds; and the tetanus which is produced by the administration of strychnia, bruschia, and nux vomica, all of which are different forms of the same poison. Idiopathic tetanus is a very rare disease in England Sir Benjamin Brodie had seen only one doubtful case of it. Mr Daniel, who for twenty-eight years was surgeon to the Bristol Hospital, saw only two, Mr Nunneley, professor of surgery at Leeds, had seen four In India, however, it is comparatively common Mr Jackson, in twenty-five years' practice there saw about forty cases. It was agreed on all hands, that though the exciting cause of the two diseases is different, their symptoms are the same They were described in similar terms by several of the witnesses Dr Todd said the disease begins with stiffness about the jaw, the symptoms [140] then extend themselves to the other muscles of the trunk and body They gradually develop themselves When once the disease has begun there are remissions of severity, but not complete intermission of the symptoms In acute cases the disease terminates in three or four days In chronic cases it will go on for as much as three weeks There was some question as to what was the shortest case upon record In a case mentioned by one of the prisoner's witnesses, Mr Ross, the patient was said to have been attacked in the morning either at eleven or some hours earlier, it did not clearly appear which, and to have died at half-past seven in the evening This was the shortest case specified on either side, though its duration was not accurately determined As a rule however tetanus, whether traumatic or idiopathic, was said to be a matter not of minutes, or even of hours, but of days (2)

Such being the nature of tetanus, traumatic and idiopathic, four questions arose Did Cook die of tetanus? Did he die of traumatic tetanus? Did he die of idiopathic tetanus? Did he die of the tetanus produced by strychnia? The case for prosecution upon these questions was, first, that he did die of tetanus Mr Curling said no doubt there was spasmodic action of the muscles (which was his definition of tetanus) in Cook's case, and even Mr Nunneley, the principal witness for the prisoner, who contended that the death of Cook was [141] caused neither by tetanus in its ordinary forms nor by the tetanus of strychnia, admitted that the paroxysm described by Mr Jones was "very like" the paroxysm of tetanus The close general resemblance of the symptoms to those of tetanus was indeed assumed by all the witnesses on both sides as was proved by the various distinctions which were stated on the side of the Crown between Cook's symptoms and those of trumatic and idiopathic tetanus, and on the side of the prisoner between Cook's symptoms and the symptoms of the tetanus of strychnia It might, therefore be considered to be established that he died of tetanus in some form or other

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(1) State of things under which crime was committed (section 7)

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(1) State of things under which crime was committed (section 7)

(2) Opinions of experts, and facts on which they were founded (sections 45 46) The rest of the evidence falls under this head

The next point asserted by the prosecution was, that he did not die of traumatic or idiopathic tetanus, because there was no wound on his body, and also because the course of the symptoms was different They further asserted that the symptoms were those of poison by strychnia

Upon these points the evidence was as follows —Mr Curling was asked Q "Were the symptoms consistent with any form of traumatic tetanus which has ever *come under your knowledge or observation* ?" *He answered*, "*No*" Q "What distinguished them from the cases of traumatic tetanus which you have described ?" A "There was the sudden onset of the fatal symptoms In all cases that have fallen under my notice the disease has been preceded by the milder symptoms of tetanus" Q "Gradually progressing to their complete development, and *completion and death* ?" A "*Yes*" He also **[142]** mentioned "the sudden onset and rapid subsidence of the spasms as inconsistent with the theory of either traumatic or idiopathic tetanus, and he said he had never known a case of tetanus which ran its course in less than eight or ten hours In the one case which occupied so short a time the true period could not be ascertained In general, the time required was from one to several days Sir Benjamin Brodie was asked, "In your opinion are the symptoms those of traumatic tetanus or not ?" He replied, "As far as the spasmodic contraction of the muscles goes the symptoms resemble those of traumatic tetanus, as to the course which the symptoms took, that was entirely different He added, "The symptoms of traumatic tetanus always begin, as far as I have seen, very gradually, the stiffness of the lower jaw being I believe, the symptom first complained of—at least, so it has been in my experience, then the contraction of the muscles of the back is always a later symptom generally much later, the muscles of the extremities are affected in a much less degree than those of the neck and trunk, except in some cases, where the injury has been in a limb and an early symptom has been a contraction of the muscles of that limb I do not myself recollect a case in which in ordinary tetanus there was that contraction of the muscles of the hand which I understand was stated to have existed in this instance The ordinary tenaus rarely runs its course in less than two or three days, and often is protracted to a much longer period, I know one case only in which the disease was **[143]** said to have terminated in twelve hours" He said, in conclusion "I never saw a case in which the symptoms described arose from any disease, when I say that, of course, I refer not to the particular symptoms, but to the general course which the symptoms took" Mr Daniel being asked whether the symptoms of Cook could be referred to idiopathic or traumatic tetanus said, "*In my judgment they could not*" *He* also said that he should repeat Sir Benjamin Brodie's words if he were to enumerate the distinctions Mr Solly said that the symptoms were not referable to any disease he ever witnessed, and Dr Todd said, "I think the symptoms were those of strychnia" The same opinion was expressed with equal confidence by Dr Alfred Taylor, Dr Rees, and Mr Christison

In order to support this general evidence witnesses were called who gave account of three fatal cases of poisoning by strychnia, and of one case in which the patient recovered The first of the fatal cases was that of Agnes French, *or Senet, who was accidentally poisoned* at Glasgow Infirmary, in 1815, by some pills which she took and which were intended for a paralytic patient According to the nurse, the girl was taken ill three-quarters of an hour, according to one of the physicians (who, however, was not present) twenty minutes, after she swallowed the pills She fell suddenly back on the floor, when her clothes were cut off she was stiff, "just like a poker," her arms were stretched out, her hands clenched, she vomited slightly, she had no lockjaw, **[144]** there was a retraction of the mouth and face, the head was bent back, the spine curved She went into severe paroxysms every few seconds, and died about an hour after

the symptoms began. She was perfectly conscious. The heart was found empty on examination

The second case described was that of Mrs. Serjeantson Smyth, who was accidentally poisoned at Romsey in 1848, by strychnine put into a dose of ordinary medicine instead of salicine. She took the dose about five or ten minutes after seven; in five or ten minutes more the servant was alarmed by a violent ringing of the bell. She found her mistress leaning on a chair, went out to send for a doctor, and on her return found her on the floor She screamed loudly She asked to have her legs pulled straight and to have water thrown over her A few minutes before she died she said, " Turn me over, " she was turned over, and died very quietly almost immediately. The fit lasted about an hour The hands were clenched, the feet contracted and on a *post-mortem* examination the heart was found empty.

The third case was that of Mrs. Dove, who was poisoned at Leeds by her husband (for which he was afterwards hanged) in February, 1856. She had five attacks on the Monday, Wednesday, Thursday, Friday, and Saturday of the week beginning February 24th. She had prickings in the legs and twitchings in the hands. She asked her husband to rub her arms and legs before the spasms came on but when they were strong she could not bear her legs to be touched The fatal attack in her case lasted two **[145]** hours and-a-half The hands were semi-bent, feet strongly arched. The lungs were congested, the spinal cord was also *much congested. The head being opened first, a good* deal of blood flowed out, part of which might flow from the heart

The case, in which the patient recovered was that of a paralytic patient of Mr Moore's He took an overdose of strychnia, and in about three-quarters of an hour Mr Moore found him stiffened in every limb His head was drawn back, he was screaming and " frequently requesting that we should turn him move him, rub him " His spine was drawn back He snapped at a spoon with which an attempt was made to administer medicine, and was perfectly conscious during the whole time

Dr Taylor and Dr Owen Rees examined Cook's body They found no strychnia, but they found antimony in the liver, the left kidney, the spleen and also in the blood

The case for the prosecution upon this evidence was, that the symptoms were those of tetanus, and of tetanus produced by strychnia The case for the prisoner was, first, that several of the symptoms observed were inconsistent with strychnia, and secondly, that all of them might be explained on other hypotheses Their evidence was given in part by their own witnesses, and in part by the witnesses for the Crown in cross-examination The replies suggested by the Crown were founded partly on the evidence of their own witnesses given by way of anticipation, and partly by the evidence obtained from the witnesses for the prisoner on cross-examination

[146] The first and most conspicuous argument on behalf of the prisoner was, that the fact that no strychnia was discovered by Dr Taylor and Dr Rees was inconsistent with the theory that any had been administered The material part of Dr Taylor's evidence upon this point was, that he had examined the stomach and intestines of Cook for a variety of poisons strychnia among others without success The contents of the stomach were gone, though the contents of the intestines remained and the stomach itself had been cut open from end to end, and turned inside out, and the mucous surface on which poison, if present, would have been found was rubbing against the surface of the intestines This Dr Taylor considered a most unfavourable condition for the discovery of poison and Mr Christison agreed with him Several of the prisoner's witnesses on the contrary—Mr Nunneley, Dr Letheby, and Mr Rogers—thought that it would

only increase the difficulty of the operation, and not destroy its chance of success

Apart from this Dr Taylor expressed his opinion that from the way in which strychnia acts, it might be impossible to discover it even if the circumstances were favourable The mode of testing its presence in the stomach is to treat the stomach in various ways until at last a residue is obtained which, upon the application of certain chemical ingredients changes its colour if strychnia is present All the witnesses agreed that strychnia acts by absorption—that is it is taken up from the stomach by the absorbents, thence it passes into the blood thence into the solid [147] part of the body, and at some stage of its progress causes death by its action on the nerves and muscles Its noxious effects do not begin till it has left the stomach From this Dr Taylor argued that if a minimum dose were administered none would be left in the stomach at the time of death, and therefore none could be discovered there He also said that if the strychnia got into the blood before examination, it would be diffused over the whole mass and so no more than an extremely minute portion would be present in any given quantity If the dose were half a grain and there were twenty five pounds of blood in the body, each pound of blood would contain only one fiftieth of a grain He was also of opinion that the "strychnia undergoes some chemical change by reason of which its presence in small quantities in the tissues cannot be detected" In short, the result of his evidence was that if a minimum dose were administered, it was uncertain whether strychnia would be present in the stomach after death, and that if it was not in the stomach there was no certainty that it could be found at all He added that he considered the colour tests fallacious, because the colours might be produced by other substances

Dr Taylor further detailed some experiments which he had tried upon animals jointly with Dr Rees for the purpose of ascertaining whether strychnia could always be detected He poisoned four rabbits with strychnia and applied the tests for strychnia to their bodies In one case where two grains had been administered at intervals he obtained proof of the presence of strychnia both by a bitter [148] taste and by the colour In a case where one grain was administered he obtained the taste but not the colour In the other two cases where he administered one grain and half a grain respectively he obtained no indication at all of the presence of strychnia These experiments proved to demonstration that the fact that *he* did not discover strychnia did not prove that no strychnia was present in Cook's body

Mr Nunneley Mr Herapath, Mr Rogers Dr Letheby and Mr Wrightson contradicted Dr Taylor and Dr Rees upon this part of their evidence They denied the theory that strychnine undergoes any change in the blood and they professed their own ability to discover its presence even in most minute quantities in any body into which it had been introduced, and their belief that the colour tests were satisfactory Mr Herapath said that he had found strychnine in the blood and in a small part of the liver of a dog poisoned by it , and he also said that he could detect the fifty thousandth part of a grain if it were unmixed with organic matter Mr Wrightson (who was highly complimented by Lord Campbell for the way in which he gave his evidence) also said that he should expect to find strychnia if it were present, and that he had found it in the tissues of an animal poisoned by it

Here no doubt, there was a considerable conflict of evidence upon a point on which it was difficult for unscientific persons to pretend to have any opinion The evidence given for the prisoner, however, tended to prove not so much that there was no strychnia in Cook's body, [149] as that Dr Taylor ought to have found it if there was In other words, it has less to do with the guilt or innocence of the prisoner, than with the question whether Mr Nunneley and Mr Herapath were or were not better analytical chemists than Dr Taylor

The evidence could not even be considered to shake Dr Taylor's credit, for no part of the case rested on his evidence except the discovery of the antimony, as to which he was corroborated by Mr Brande, and was not contradicted by the prisoner's witnesses His opinion as to the nature of Cook's symptoms was shared by many other medical witnesses of the highest eminence, whose credit was altogether unimpeached. The prisoner's counsel were placed in a curious difficulty by this state of the question. They had to attack, and did attack, Dr. Taylor's credit vigorously for the purpose of rebutting his conclusion that Cook might have been poisoned by strychnine, yet they had also to maintain his credit as a skilful analytical chemist, for if they destroyed it, the fact that he did not find strychnine went for nothing This dilemma was fatal *To admit his skill was to admit their client's guilt. To deny it was to destroy* the value of nearly all their own evidence The only possible course was to admit his skill and deny his good faith, but this too was useless, for the reason just mentioned.

Another argument used on behalf of the prisoner was that some of the symptoms of Cook's death were inconsistent with poisoning by strychnine *Mr Nunneley and Dr Letheby thought that the facts that Cook sat up in* **[150]** bed when the attack came on, that he moved his hands, and swallowed, and asked to be rubbed and moved, showed more power of voluntary motion than was consistent with poisoning by strychnia. But Mrs Serjeantson Smyth got out of bed and rang the bell, and both she, Mrs. Dove and Mrs Moore's patient begged to be rubbed and moved before the spasms came on Cook's movements were before the paroxysm set in, and the first paroxysm ended his life

Mr *Nunneley referred to the fact that the heart was empty, and said that,* in his experiments, he always found that the right side of the heart of the poisoned animals was full

Both in Mrs Smyth's case, however, and in that of the girl Senet, the heart was found empty, and in Mrs Smyth's case the chest and abdomen were opened first, so that the heart was not emptied by the opening of the head Mr Christison said that if a man died of spasms of the heart, the heart would be emptied *by them, and would be found empty after death, so that the* presence or absence of the blood proved nothing

Mr Nunneley and Dr Letheby also referred to the length of time before the symptoms appeared, as inconsistent with poisoning by strychnine The time between the administration of the pills and the paroxysm was not accurately measured It might have been an hour, or a little less, or more, but the poison, if present at all was administered in pills, which would not begin to operate till they were broken up, and the rapidity with which they **[151]** would be broken up, would depend upon the materials of which they were made Mr Christison said that if the pills were made up with resinous materials, such as are within the knowledge of every medical man, their operation would be delayed He added, "I do not think we can fix, with our present knowledge, the precise time for the poison beginning to operate" According to the account of one witness in Agnes French's case, the poison did not operate for three-quarters of an hour, though probably her recollection of the time was not very accurate after ten years Dr Taylor also referred (in cross examination) to cases in which an hour and a half, or even two hours elapsed, before the symptoms showed themselves

These were the principal points in Cook's symptoms said to be inconsistent with the administration of strychnia All of them appear to have been satisfactorily answered Indeed, the inconsistency of the symptoms with strychnia was faintly maintained The defence turned rather on the possibility of showing that they were consistent with some other disease

In order to make out this point various suggestions were made In the cross examination of the different witnesses for the Crown it was frequently suggested that the case was one of traumatic tetanus caused by syphilitic sores, but to this there were three fatal objections In the first place, there were no syphilitic sores, in the second place no witness for the prisoner said that he thought that it was a case of traumatic tetanus, and in the third place several doctors of great experience in respect of syphilis—specially [152] Dr Lee the physician to the Lock Hospital—declared that they never heard of syphilitic sores producing tetanus Two witnesses for the prisoner were called to show that a man died of tetanus who had sores on his elbow and elsewhere, which were possibly syphilitic, but it did not appear whether he had rubbed or hurt them and Cook had no symptoms of the sort

Another theory was that the death was caused by general convulsions This was advanced by Mr Nunneley but he was unable to mention any case in which general convulsions had produced death without destroying consciousness He said vaguely he had heard of such cases, but had never met with one Dr McDonald of Garnkirk near Glasgow said that he considered the case to be one of epileptic convulsions with tetanic complications' But he also failed to mention an instance in which epilepsy did not destroy consciousness This witness assigned the most extraordinary reasons for supposing that it was a case of this form of epilepsy He said that the fit might have been caused by sexual excitement, though the man was ill at Rugeley for nearly a week before his death, and that it was within the range of possibility that sexual intercourse might produce a convulsion fit after an interval of a fortnight

Both Mr Nunneley and Dr McDonald were cross examined with great closeness Each of them was taken separately through all the various symptoms of the case and asked to point out how they differed from those of poisoning by strychnia and what were the reasons why they should be supposed to arise from anything else After [153] a great deal of trouble Mr Nunneley was forced to admit that the symptoms of the paroxysm were ' very like ' those of strychnia and that the various predisposing causes which he mentioned as likely to produce convulsions could not be shown to have existed He said for instance that excitement and depression of spirits might predispose to convulsions, but the only excitement under which Cook had laboured was on winning the race a week before and as for depression of spirits he was laughing and joking with Mr Jones a few hours before his death Dr McDonald was equally unable to give satisfactory explanation of these difficulties It is impossible by any abridgment to convey the full effect which these cross examinations produced They deserve to be carefully studied by anyone who cares to understand the full effect of this great instrument for the manifestation not merely of truth but of accuracy and fairness

Of the other witnesses for the prisoner Mr Herapath admitted that he had said that he thought that there was strychnine in the body, but that Dr Taylor did not know how to find it He added that he got his impression from newspaper reports, but it did not appear that they differed from the evidence given at the trial Dr Letheby said that the symptoms of Cook were irreconcilable with everything that he was acquainted with—strychnia poison included He admitted however that they were not inconsistent with what he had heard of the symptoms of Mrs Serjeantson Smyth who was undoubtedly poisoned by strychnine Mr Partridge was called to [154] show that the case might be one of arachnitis or inflammation of one of the membranes of the spinal cord caused by two granules discovered there In cross examination he instantly admitted with perfect frankness that he did not think the case was one of arachnitis as the symptoms were not the same Moreover on being asked whether the symptoms described by Mr Jones were consistent with poisoning by strychnia he said ' Quite ', and he concluded by saying that in

the whole course of his experience and knowledge he had never seen such a death proceed from natural causes Dr Robinson from Newcastle was called to show that tetanic convulsions preceded by epilepsy were the cause of death He, however, expressly admitted in cross-examination that the symptoms were consistent with strychnia and that some of them were inconsistent with epilepsy He said that in the absence of any other cause if he put aside the hypothesis of strychnia he would ascribe it to epilepsy and that he thought the granules in the spinal cord might have produced epilepsy The degree of importance attached to these granules by different witnesses varied Several of the witnesses for the Crown considered them unimportant The last of the prisoner's witnesses was Dr Richardson who said the disease might have been angina pectoris He said however that the symptoms of angina pectoris were so like those of strychnine that he should have great difficulty in distinguishing them from each other

The fact that antimony was found was never seriously disputed nor could it be denied that its administration **[155]** would account for all the symptoms of sickness, etc which occurred during the week before Cook's death No one but the prisoner could have administered it

The general result of the whole evidence on both sides appears to be to prove beyond all reasonable doubt that the symptoms of Cook's death were perfectly consistent with those of poisoning by strychnine and that there was strong reason to believe that they were inconsistent with any other cause Coupling this with the proof that Palmer bought strychnia just before each of the two attacks and that he robbed Cook of all his property it is impossible to doubt the propriety of the verdict

Palmer's case is remarkable on account of the extraordinary minuteness and labour with which it was tried and on account of the extreme ability with which the trial was conducted on both sides Rema Palme case

The intricate set of facts which show that Palmer had a strong motive to commit the crime his behaviour before it, at the time when it was being committed and after it had been committed the various considerations which showed that Cook must have died by tetanus produced by strychnine that Palmer had the means of administering strychnine to him that he did actually administer what in all probability was strychnine that he also administered antimony on many occasions, and that all the different theories by which Cook's death otherwise than by strychnine could be accounted for were open to fatal objections form a collection of eight or ten different sets of facts all connected **[156]** together immediately or remotely either as being or as being shown not to be *the causes or the effects of Cook's murder* or as *forming part* of the actual murder itself

The scientific evidence is remarkable on various grounds but particularly because it supplies a singularly perfect illustration of the identity between the ordinary processes of scientific research and the principles explained above as being those on which Judicial Evidence proceeds Take for instance the question did Cook die of tetanus either traumatic or idiopathic? The symptoms of those diseases are in the first place ascertained inductively and their nature was proved by the testimony of Sir Benjamin Brodie and others The course of the symptoms being compared with those of Cook they did not correspond The inference by deduction was that Cook's death was not caused by those diseases Logically the matter might be stated thus —

All persons who die either of traumatic or of idiopathic tetanus exhibit a certain course of symptoms

Cook did not exhibit that course of symptoms therefore Cook did not die of traumatic or of idiopathic tetanus

Everyone of the arguments and theories stated in the case may easily be shown by a little attention to be so many illustrations of the rules of evidence on the one hand, and of the rules of induction and deduction on the other

On the other hand, a flood of irrelevant matter apparently connected with the trial pressed so to speak, for admittance, and if it had been admitted, would have swollen the trial to unmanageable proportions and thrown no real [157] light upon the main question Palmer was actually indicted for the murder of his wife, Anne Palmer, and for the murder of his brother, Walter Palmer Every sort of story was in circulation as to what he had done It was said that twelve or fourteen persons had at different times been buried from his house under suspicious circumstances It was said that he had poisoned Lord George Bentinck who died very suddenly some years before He had certainly forged his mother's acceptance to bills of exchange, and had carried on a series of gross frauds on insurance offices There was the strongest reason to suspect that the evidence of Jeremiah Smith referred to in the case, was plotted and artful perjury If Palmer had been tried in France, every one of these and innumerable other topics would have been introduced and the real matter in dispute would not have been nearly so fully discussed

No case sets in a clearer light either the theory or the practical working of the principles on which the Evidence Act is based

One special matter on which Palmer s trial throws great light is the nature of the evidence of experts The provisions relating to this subject are contained in sections 45 and 46 of the Evidence Act The only point of much importance in connection with them is that it should be borne in mind that their evidence is given on the assumption that certain facts occurred but that it does not in common cases show whether or not the facts on which the expert gives his opinion did really occur For instance, [158] Sir Benjamin Brodie and other witnesses in Palmer's case said that the symptoms they had heard described were the symptoms of poisoning by strychnine, but whether the maid servants and others who witnessed and described Cook's death were or were not speaking the truth was not a question for them, but for the jury Strictly speaking an expert ought not to be asked "Do you think that the deceased man died of poison ?" He ought to be asked to what cause he would attribute the death of the deceased man assuming the symptoms attending his death to have been correctly described ? or whether any cause except poison would account for such and such specified symptoms ? This, however, is a matter of form The substance of the rules as to experts is that they are only witnesses, not judges , that their evidence, however important, is intended to be used only as materials upon which others are to form their decision , and that the fact which they have to prove is the fact that they entertain certain opinions on certain grounds and not the fact that grounds for their opinions do really exist

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[159] Irrelevant Facts

Having thus described and illustrated the theory of relevancy, it will be desirable to say something of irrelevant facts which might at first sight be supposed to be relevant

From the explanations given in the earlier part of the chapter it follows that facts are irrelevant unless they can be shown to stand in the relation of cause or in the relation of effect to facts in issue, every step in the connection being either proved or of such a nature that it may be presumed without proof

What facts are irrelevant

The vast majority of ordinary facts simply co-exist without being in any assignable manner connected together. For instance, at the moment of the *commission of a crime in a great city numberless other transactions are going* on in the immediate neighbourhood, but no one would think of giving evidence of them unless they were in some way connected with the crime. Facts obviously irrelevant therefore present little difficulty. The only difficulty arises in dealing with facts which are apparently relevant but are not really so. The *most important of these are three*:—

Facts apparently relevant

1. Statements as to facts made by persons not called as witnesses.

[160] 2. Transactions similar to but unconnected with the facts in issue.

3. Opinions formed by persons as to the facts in issue or relevant facts.

None of these are relevant within the *definition of relevancy given in sec*tions 6—11, both inclusive. It may possibly be argued that the effect of the second paragraph of section 11* would be to admit proof of such facts as these. It may, for instance, be said *A* (not called as a witness) was heard to declare that he had seen *B* commit a crime. This makes it highly probable that *B* did *commit that crime. Therefore A's declaration is a relevant fact under section* 11. This was not the intention of the section, as is shown by the elaborate provisions contained in the following part of the Chapter II (sections 32—39) as to particular classes of statements, which are regarded as relevant facts either because the circumstances under which they are made invest them with *importance, or because no better evidence can be got. The sort of facts which* the section was intended to include are facts which either exclude or imply more or less distinctly the existence of the facts sought to be proved. Some degree of latitude was designedly left in the working of the section (in compliance with a suggestion from the Madras Government) **[161]** on account of the variety *of matters to which it might apply.* The meaning of the section would have been more fully expressed if words to the following effect had been added to it:—

"No statement shall be regarded as rendering the matter stated highly probable within the meaning of this section unless it is declared to be a relevant fact under some other section of this Act."

Reason for exclusion of hearsay

The reasons why statements as to facts made by persons not called as witnesses are excluded, except in certain specified cases (see sections 17—39) are various. In the first place, it is matter of common experience that statements in common conversation are made so lightly, and are so liable to be misunderstood or misrepresented, that they cannot be depended upon for any important purpose unless they are made under special circumstances.

Objection

It may be said that this is an objection to the weight of such statements and not to their relevancy, and there is some degree of truth in this remark. No doubt, when a man has to inquire into facts of which he receives in the first instance very confused accounts, it may and often will be extremely important for him to trace the most cursory and apparently futile report. And facts relevant in the highest degree to facts in issue may often be discovered in this manner. A policeman or a lawyer engaged in getting up a case, Criminal or Civil, would neglect his duty altogether if he shut his ears to everything which was not relevant within the meaning of **[162]** the Evidence Act. A Judge or Magistrate in India frequently has to perform duties which in England would

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*Section 11 is as follows:—

Facts not *otherwise relevant* are relevant:—

(1) If they are inconsistent with any fact in issue or relevant fact;

(2) If by themselves or in connection *with other facts they make the existence* or non-existence of any fact in issue or relevant fact highly probable or improbable.

be performed by police officers or attorneys He has to sift out the truth for himself as well as he can and with little assistance of a professional kind

Effect of section 165

Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth The effect of this section * is that in order to get to the bottom of the matter before it the Court will be able to look at and inquire into every fact whatever It will not, however, be able to found its judgment upon the class of statements in question for the following reason —

If this were permitted it would present a great temptation to indolent Judges to be satisfied with second hand reports

It would open a wide door to fraud People would make statements for which they would be in no way responsible, and the fact that these statements were made would be proved by witnesses who knew nothing of the matter stated Everyone would thus be at the mercy of people who might choose to tell a lie and loose evidence could neither be tested nor contradicted

Suppose that *A B*, *C* and *D* give to *E F*, and *G* a minute detailed account of a crime which they say was [163] committed by *Z*, *E*, *F* and *G* repeat what they have heard correctly *A B C* and *D* disappear or are not forthcoming It is evident that *Z* would be altogether unable to defend himself in this case and that the Court would be unable to test the statement of *A B C* and *D* The only way to avoid this is to exclude such evidence altogether and so to put upon both Judges and Magistrates as strong a pressure as possible to get to the bottom of the matter before them

It would waste an incalculable amount of time To try to trace unauthorized and irresponsible gossip and to discover the grains of truth which may lurk in it is like trying to trace a fish in the water

Unconnected transactions

The exclusion of evidence as to transactions similar to but not specially connected with the facts in issue rests upon the ground that if it were not enforced every trial whether civil or criminal might run into an inquiry into the whole life and character of the parties concerned Litigants have frequently many matters in difference besides the precise point legally at issue between them and it often requires a good deal of rigour to prevent them from turning Courts of Justice into theatres in which all their affairs may be discussed A very slight acquaintance with French procedure is enough to show the evils of not keeping people close to the point in judicial proceedings

Exclusion of evidence of opinion

As to evidence of opinion it is excluded because its admission would in nearly all cases be mere waste of time

Exception to rules as to irrelevancy

[164] *The concluding part of the chapter on the relevancy of facts* enumerates the exceptions which are to be made to the general rules as to irrelevancy The rules as to admissions, statements made by persons who can not be called as witnesses and statements made under circumstances which in themselves afford a guarantee for their truth are an exception to the exclusion of statements as proof of the matter stated

Judgments in Courts of Justice on other occasions form an exception to the exclusion of evidence of transactions not specifically connected with facts in issue and the provisions as to the admission of evidence of opinions in certain cases are contained in sections 45—55 I will notice very shortly the principle on which these provisions proceed

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* Section 165 is as follows —

The Judge may in order to discover or obtain proper proof of relevant facts ask any question he pleases in any form at any time of any witness or of the parties about any fact relevant or irrelevant and may order the production of any document or thing

1 The general rule with regard to admissions which are defined to mean all that the parties or their representatives in certain degrees say about the matter in dispute, or facts relevant thereto is that they may be proved as against those who made them but not in their favour The reason of the rule is obvious If *A* says ' *B* owes me money , the mere fact that he says so does not even tend to prove the debt If the statement has any value at all it must be derived from some fact which lies beyond it for instance *A* s recollection of his having lent *B* the money To that fact of course *A* can testify but his subsequent assertions add nothing to what he has to say If on the other hand *A* had said " *B* does **[165]** not owe me anything this is a fact of which *B* might make use, and which might be decisive of the case — Admissions

Admissions *in reference to crimes are usually called confessions* I may observe upon the provisions relating to them that sections 25 26 and 27 were transferred to the Evidence Act *verbatim* from the Code of Criminal Procedure Act XXV of 1861 They differ widely from the law of England and were inserted in the Act of 1861 in order to prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody — *Confessions*

Statements made by persons who are dead or otherwise incapacitated *from being called as witnesses are admitted in the cases mentioned in sections* 32 and 33 The reason is that in the case in question no better evidence is to be had — Statements by witness who cannot be called

In certain cases statements are made under circumstances which in themselves are a strong reason for believing them to be true and in these cases there is generally little use in calling the person by whom the statement was made The sections which relate to them are 31—38 — Statements under special circumstances

It may be well to point out here the manner in which the Evidence Act affects the proof of evidence given by a witness in a Court of Justice The relevancy of the fact that such evidence was given depends partly on the general principles of relevancy For instance if a witness were accused of giving false testimony the fact that he gave the testimony alleged to be false would be a fact **[166]** in issue But the Act also provides for cases in which the fact that evidence was given on a different occasion is to be admissible either to prove the matter stated (section 33) or in order to contradict (section 155 3) or in order to corroborate (section 157) the witness By reference to these sections it must be ascertained whether the fact that the evidence was given is relevant If it is relevant section 35 enacts that an entry of it in a record made by any public servant in the discharge of his duty shall be relevant as a mode of proving it The Codes of Civil and Criminal Procedure direct all judicial officers to make records of the evidence given before them and section 80 of the Evidence Act *provides that a document purporting to be a* record of evidence shall be presumed to be genuine that statements made as to the circumstances under which it was taken shall be presumed to be true and the evidence to have been duly taken The result of these sections taken together is that when proof of evidence given on previous occasions is admissible it may be proved by the production of the record or a certified copy (see section 76)

The sections *as to judgments (40 41) designedly omit to deal with the ques*tion of the effect of judgments in preventing further proceedings in regard of the same matter The law upon this subject is to be found in section 2 of the Code of Civil Procedure and in section 460 of the Code of Criminal Procedure The cases which the Evidence Act provides **[167]** for are cases in which the judgment of a Court is in the nature of a law and creates the right which it affirms to exist — *Judgments in other cases*

The opinions *of any person other than the Judge by whom the fact is to* be decided as to the existence of facts in issue or relevant facts are as a rule

irrelevant to the decision of the cases to which they relate for the most obvious reasons To show that such and such a person thought that a crime had been committed or a contract made would either be to show nothing at all, or would invest the person whose opinion was proved with the character of a Judge In some few cases, the reasons for which are self-evident, it is otherwise They are specified in sections 45—51

Character, when important

The sections as to character require little remark Evidence of character is, generally speaking, only a makeweight, though there are two classes of cases in which it is highly important —

(1) Where conduct is equivocal, or even presumably criminal In this case evidence of character may explain conduct and rebut the presumptions which it might raise in the absence of such evidence A man is found in possession of stolen goods He says he found them and took charge of them to give them to the owner If he is a man of very high character this may be believed

(2) When a charge rests on the direct testimony of a single witness and on the bare denial of it by the person charged A man is accused of an indecent assault by a [168] woman with whom he was accidentally left alone He denies it Here a high character for morality on the part of the accused person would be of great importance

[169] CHAPTER IV.

GENERAL OBSERVATIONS ON THE INDIAN EVIDENCE ACT

In the preceding pages I have stated and illustrated the theory of judicial evidence on which the Evidence Act is based I have but little to add to that explanation The Act speaks for itself No labour was spared to make its provisions complete and distinct As the first section repeals all unwritten rules of evidence, and as the Act itself supplies a distinct body of law upon the subject, its object would be defeated by elaborate references to English cases In so far as it is obscure or incomplete, the Judges and the Legislature are it proper critics If it is turned into an abridgment of the law which it was meant to replace, it will be injurious instead of being useful to those for whom it was intended I shall accordingly content myself with a very short description of the contents of the remainder of the Act referring for a full explanation of the matter to the Act itself No reference to English cases

The general scheme of Part II, which relates to Proof and consists of four chapters containing forty five sections, may be expressed in the following propositions Scheme of Part II

[170] 1 Certain facts are so notorious in themselves or are stated in so authentic a manner in well known and accessible publications that they require no proof The Court if it does not know them can inform itself upon them without formally taking evidence These facts are said to be judicially noticed Judicial notice

2 All facts except the contents of documents may be proved by oral evidence which must in all cases be direct That is it must consist of a declaration by the witness that he perceived by his own senses the fact to which he testifies Oral Evidence

3 The contents of documents must be proved either by the production of the document which is called primary evidence or by copies or oral accounts of the contents which are called secondary evidence Primary evidence is required as a rule but this is subject to seven important exceptions in which secondary evidence may be given The most important of these are (1) cases in which the document is in the possession of the adverse party in which case the adverse party must in general (though there are several exceptions) have notice to produce the document before secondary evidence of it can be given Documents

And (2) cases in which certified copies of public documents are admissible in place of the documents themselves

4 Many classes of documents which are defined in the Act are presumed to be what they purport to be but this presumption is liable to be rebutted Two sets of presumptions will sometimes apply to the same document For [171] instance what purports to be a certified copy of a record of evidence is produced It must by section 76 be presumed to be an accurate copy of the record of evidence By section 80 the facts stated in the record itself as to the circumstances under which it was taken *e g* that it was read over to the witness in a language which he understood must be presumed to be true

Writings when exclusive evidence

5 When a contract grant, or other disposition of property is reduced to writing the writing itself (or secondary evidence of its contents) is not only the best, but is the only admissible evidence of the matter which it contains It cannot be varied by oral evidence, except in certain specified cases

It is necessary in applying these general doctrines (the expediency of which is obvious) to practice to go into considerable detail and to introduce provisions, exceptions, and qualifications which appear more intricate and difficult than they really are If, however, the propositions just stated are once distinctly understood and borne in mind, the details will be easily mastered when the occasion for applying them arises The provisions in the Act are all made in order to meet real difficulties which arose in practice in England, and which must of necessity arise over and over again and give occasion to litigation unless they are specifically provided for beforehand

Principle of provisions in documentary evidence

One single principle runs through all the propositions relating to documentary evidence It is that the very object for which writing is used is to perpetuate the memory of what is written down, [172] and so to furnish permanent proof of it In order that full effect may be given to this, two things are necessary, namely, that the document itself should whenever it is possible, be put before the Judge for his inspection, and that if it purports to be a final settlement of a previous negotiation as in the case of a written contract it shall be treated as final and shall not be varied by word of mouth If the first of these rules were not observed the benefit of writing would be lost There is no use in writing a thing down unless the writing is read If the second rule were not observed people would never know when a question was settled, as they would be able to play fast and loose with their writings

By bearing these leading principles in mind the details and exceptions will become simple Their practical importance is indeed as nothing in comparison to the importance of the rules which they qualify

The third part of the Act, which contains three chapters (Chapters VII VIII and IX) and sixty seven sections, relates to the production and effect of evidence

Chapter VII which relates to the burden of proof, deals with a subject which requires a little explanation This is the subject of presumptions Like most other words introduced into the law of Evidence it has various meanings, and has besides a history to which I shall refer very shortly

In times when the true theory of proof was very imperfectly understood, inasmuch as physical science, by the progress of which that theory was gradually discovered, [173] was in its infancy, numerous attempts were made to construct theories as to the weight of evidence which should supply the want of one founded on observation In some cases this was effected by requiring the testimony of a certain number of witnesses in particular cases, such a fact must be proved by two witnesses such another by four, and so on In other cases particular items of evidence were regarded as full proof, half full proof, proof less than half full, and proof more than half full

The doctrine of presumptions was closely connected with this theory Presumptions were inferences which the Judges were directed to draw from certain states of facts in certain cases and these presumptions were allowed a certain amount of weight in the scale of proof, such a presumption and such evidence amounted to full proof such another to half full and so on The very irregular manner in which the English law of evidence grew up has had, amongst other effects that of making it an uncertain and difficult question how far the theory of presumptions and the other theories of which they

formed a part, affect English law, but substantially the result is somewhat as follows —

Presumptions are of four kinds according to English law

1 Conclusive presumptions These are rare, but when they occur they provide that certain modes of proof shall not be liable to contradiction

2 Presumptions which affect the ordinary rule as to the burden of proof that he who affirms must prove He [174] who affirms that a man is dead must usually prove it, but if he shows that the man has not been heard of for seven years, he shifts the burden of proof on his adversary

3 There are certain presumptions which, though liable to be rebutted are regarded by English law as being something more than mere maxims, though it is by no means easy to say how much more An instance of such a presumption is to be found in the rule that recent possession of stolen goods unexplained raises a presumption that the possessor is either the thief or a receiver

4 Bare presumptions of facts which are nothing but arguments to which the Court attaches whatever value it pleases Presumptions

Chapter VII of the Evidence Act deals with this subject as follows — First it lays down the general principles which regulate the burden of proof (sections 101—106) It then enumerates the cases in which the burden of proof is determined in particular cases, not by the relation of the parties to the cause but by presumptions (sections 107—111) It notices two cases of conclusive presumptions, the presumption of legitimacy from birth during marriage (section 112), and the presumption of a valid cession of territory from the publication of a notification to that effect in the *Gazette of India* (section 113) This is one of several conclusive Statutory presumptions which will be found in different parts of the Statutes and Acts Finally, it declares in section 114, that the Court may in all cases whatever draw from the facts before it whatever inferences it thinks just The terms of this section are such [175] as to reduce to their proper position of mere maxims which are to be applied to facts by the Courts in their discretion, a large number of presumptions to which English law gives to a greater or less extent, an artificial value Nine of the most important of them are given by way of illustration

All notice of certain general legal principles which are sometimes called presumptions, but which in reality belong rather to the substantive law than the law of Evidence, was designedly omitted, not because the truth of those principles was denied, but because it was not considered that the Evidence Act was the proper place for them The most important of these is the presumption as it is sometimes called, that everyone knows the law The principle is far more correctly stated in the maxim that ignorance of the law does not excuse a breach of it, which is one of the fundamental principles of Criminal Law

The subject of estoppels (Chapter VIII) differs from that of presumptions in the circumstance that an estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving peculiar facts A presumption is a rule that particular inferences shall be drawn from particular facts whoever proves them Much of the English learning connected with estoppels is extremely intricate and technical but this arises principally from two causes the peculiarities of English special pleading and the fact that the effect of prior judgments is usually treated by the English text writers as a branch of the law of Evidence, and not as a branch of law of Civil Procedure

[176] The remainder of the Act consists of a reduction to express propositions of rules as to the examination of witnesses, which are well established and understood They call for no commentary or introduction as they sufficiently explain their own meaning and do not materially vary the existing law and practice

(2) In sub-section (1)—

(*a*) the expression "Indian Income-tax" means income-tax and super-tax charged in accordance with the provisions of this Act;

(*b*) the expression "Indian rate of tax" means the amount of the Indian income-tax divided by the income on which it was charged;

(*c*) the expression "United Kingdom income-tax" means income-tax and super-tax chargeable in accordance with the provisions of the Income-tax Acts.

Limitation of claims for refund

50. No claim to any refund of income-tax under this Chapter shall be allowed, unless it is made within one year from the last day of the year in which the tax was recovered, [or before the last day of the financial year commencing after the expiry of the previous year, as defined in clause (11) of section 2, in which the income arose on which the tax was recovered, whichever period may expire later:

Provided that a claim to refund under section 49 may be admitted after the period of limitation herein prescribed, when the applicant satisfies the Commissioner, or an Assistant Commissioner of Income-tax specially empowered in this behalf by the Central Board of Revenue, that he had sufficient cause for not making the claim within such period.][13]

CHAPTER VIII

OFFENCES AND PENALTIES

Failure to make payments or deliver returns or statements or allow inspection

51. If a person fails without reasonable cause or excuse—

(*a*) to deduct and pay any tax as required by section 18 or under sub-section (5) of section 46;

(*b*) to furnish a certificate required by sub-section (9) of section 18 or by section 20 to be furnished;

(*c*) to furnish in due time any of the returns mentioned in [14][section 19A], section 21, section 22, or section 38;

(*d*) to produce, or cause to be produced, on or before the date mentioned in any notice under sub-section (4) of section 22, such accounts and documents as are referred to in the notice;

(*e*) to grant inspection or allow copies to be taken in accordance with the provisions of section 39;

(13) The portion in brackets was inserted by Sec. 8 of Act XXII of 1930.
(14) These words and figures were inserted by Sec. 3 of Act XXIV of 1926.

he shall, on conviction before a Magistrate, be punishable with fine which may extend to ten rupees for every day during which the default continues

52 If a person makes a statement in a verification mentioned in [15][section 19-A or] section 22, [or sub-section (2) of section 26 A],[15a] or sub section (3) of section 30, or sub section (2) of section 32 [or sub section (2) of section 33-A,][15a] which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be deemed to have committed the offence described in section 177 of the Indian Penal Code [16]

False statement in declaration

53 (1) A person shall not be proceeded against for an offence under section 51 or section 52 except at the instance of the Assistant Commissioner

Prosecution to be at instance of Assistant Commissioner

(2) The Assistant Commissioner may stay any such proceeding or compound any such offence

54 (1) All particulars contained in any statement made, return furnished or accounts or documents produced under the provisions of this Act, or in any evidence given, or affidavit or deposition made, in the course of any proceedings under this Act other than proceedings under this Chapter, or in any record of any assessment proceeding, or any proceeding relating to the recovery of a demand, prepared for the purposes of this Act, shall be treated as confidential, and notwithstanding anything contained in the Indian Evidence Act, 1872,[17] no Court shall, save as provided in this Act, be entitled to require any public servant to produce before it any such return, accounts, documents or record or any part of any such record, or to give evidence before it in respect thereof

Disclosure of information by a public servant

(2) If a public servant discloses any particulars contained in any such statement, return, accounts, documents, evidence, affidavit, deposition or record, he shall be punishable with imprisonment which may extend to six months, and shall also be liable to fine

Provided that nothing in this section shall apply to the disclosure—

(a) of any such particulars for the purposes of a prosecution under * * * * *[18] the Indian Penal Code[16] in respect of

(15) These words and figures were inserted by Sec 4 of Act XXIX of 1926
(15a) The words in brackets were inserted by Act XXI of 1930
(16) XLV of 1860
(17) I of 1872
(18) The words and figures "Section 193 of" were omitted by Sec 9 of Act XXII of 1930

any such statement, return, accounts, documents, evidence, affidavit or deposition, or for the purposes of a prosecution under this Act, or

(b) *of any such particulars to any person acting in the* execution of this Act where it is necessary to disclose the same to him for the purposes of this Act, or

(c) of any such particulars occasioned by the lawful employment under this Act of any process for the service of any notice or the recovery of any demand, or

(d) *of such facts to an authorized officer of the United* Kingdom as may be necessary to enable relief to be given under section 27 of the Finance Act, 1920,[19] or a refund to be given under section 49 of this Act

[Provided further that nothing in this section shall apply to the production by a public servant before a Court of any document, declaration or affidavit filed, or the record of any statement or deposition made in a proceeding under section 26 A, or to the giving of evidence by a public servant in respect thereof.][20]

Provided further that no prosecution shall be instituted under this section except with the previous sanction of the Commissioner

CHAPTER IX

Super Tax

Charge of super tax

55 In addition to the income tax charged for any year there shall be charged, levied and paid for that year in respect of the total income of the previous year of any [21][individual, Hindu undivided family, company, unregistered firm or other association of individuals not being a registered firm] an additional duty of income tax (in this Act referred to as super tax) at the rate or rates laid down for that year by Act[22] of the Indian Legislature

Provided that where the profits and gains of an unregistered firm have been assessed to super tax, super tax shall not be payable by an individual having a share in the firm in respect of the amount of such profits and gains which is proportionate to his share

(19) 10 & 11 Geo 5, Ch 18

(20) This proviso was inserted by Sec 10 of Act XXI of 1930

(21) These words were substituted for the words "individual, unregistered firm, Hindu undivided family or company" with effect from 1st April 1923 by Sec [illegible] of Act XI of 1924

(22) See Finance Acts and Schedule relating to Super tax

Total income for purposes of super tax

56 Subject to the provisions of this Chapter, the total income of any [23][individual, Hindu undivided family, company, unregistered firm or other association of individuals] shall, for the purposes of super tax, be the total income as assessed for the purposes of income tax, and where an assessment of total income has become final and conclusive for the purposes of income tax for any year, the assessment shall also be final and conclusive for the purposes of super tax for the same year

* * * * * * *[24]

Non resident partners and shareholders

57 (1) In the case of any [25][person] residing out of British India who is a member of a registered firm, and whose share of the profits from such firm is liable to super tax, the remaining members of such firm who are resident in British India shall be jointly and severally liable to pay the super tax due from the non resident member in respect of such share

[26][(2) Where the Income tax Officer has reason to believe that any person who is a shareholder in a company, is resident out of British India and that the total income of such person will in any year exceed the maximum amount which is not chargeable to super tax under the law for the time being in force, he may, by order in writing, require the principal officer of the company to deduct at the time of payment of any dividend from the company to the shareholder in that year super tax at such rate as the Income tax Officer may determine as being the rate applicable in respect of the income of the shareholder in that year

(3) If in any year the amount of any dividend or the aggregate amount of any dividends paid to any shareholder by a company (together with the amount of any income tax payable by the company in respect thereof) exceeds the maximum amount of the total income of a person which is not chargeable to super tax under the law for the time being in force, and the principal officer of the company has not reason to believe that the shareholder is resident in British India, and no order under sub section (2) has been received in respect of such shareholder by the principal officer from the Income tax Officer, the principal officer shall

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(23) These words were substituted for the words "individual, registered firm, Hindu undivided family or company" by S. 8 of Act XI of 19[illegible] with effect from 1st April 19[illegible]3

(24) The proviso which was added by Sec [illegible] of Act V of 19[illegible] was omitted by Sec 10 of Act III of 1928

(25) This word was substituted for the word "assessee" by Sec [illegible] of Act XXIV of 1926

(26) Sub sections (2) and (3) were substituted for the original sub section (2) by Sec [illegible] of Act XXIV of 19[illegible]

at the time of payment deduct super tax on the amount of such excess at the rate which would be applicable under the law for the time being in force if the amount of such dividend or dividends (together with the amount of such income tax as aforesaid) constituted the whole total income of the shareholder]

[27][(4)] Where any person pays any tax under the provisions of this section on account of [27][another person] who is residing out of British India, credit shall be given therefor in determining the amount of the tax to be payable by any agent of such non resident [27][person] under the provisions of sections 42 and 43

58 (1) All the provisions of this Act except section 3, the proviso to sub section (1) of section 7, the provisos to section 8, sub section (2) of section 14, and sections 15, 17, 18, 19, 20, 21 and 48 shall apply, so far as may be, to the charge, assessment, collection and recovery of super tax

Application of Act to super tax

[28][Provided that sub sections (4) to (9) of section 18 shall apply, so far as may be, to the assessment, collection and recovery of super tax under sub-section (2) or sub section (3) of section 57] [29][and under section 58 H]

(2) Save as provided in section 57, [29][and section 58 H] super tax shall be payable by the assessee direct

CHAPTER IX A [30]

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF PROVIDENT FUNDS

58 A In this Chapter, *unless there is anything repugnant in the subject or context*,—

Definitions

(*a*) a "recognised provident fund" means a provident fund which has been and continues to be recognised by the Commissioner, in accordance with the provisions of this Chapter,

(*b*) an "employer" means—

(*i*) a Hindu undivided family, company, firm or other association of individuals or persons, or

(27) Original sub section (3) was renumbered (4) and the words "another person" and "person" were substituted for the words "an assessee" and "assessee" respectively by S 5 of Act XXIV of 1926

(28) This proviso was added by Sec 6 of Act XXIV of 1926

(29) The words in brackets were inserted by Sec 4 of Act XII of 1929

(30) Chapter IX A was inserted by Sec 5 of Act XII of 1929

(*ii*) an individual engaged in a business, profession or vocation whereof the profits and gains are assessable to income-tax under section 10 or section 11 maintaining a provident fund for the benefit of his or its employees ;

(*c*) an "employee" means an employee participating in a provident fund, but does not include a personal or domestic servant ;

(*d*) a "contribution" means any sum credited by or on behalf of any employee out of his salary or by an employer out of his own monies to the individual account of an employee but does not include any sum credited as interest ;

(*e*) the 'balance to the credit' of an employee means the total amount to the credit of his individual account in a provident fund at any time ;

(*f*) the "annual accretion" to the balance to the credit of an employee means the increase to such balance in any year, arising from contributions and interest ;

(*g*) the 'accumulated balance due' to an employee means the balance to his credit or such portion thereof as may be claimable by him under the regulations of the fund on the day he ceases to be an employee of the employer maintaining the fund, and

(*h*) the 'regulations of a fund' means the special body of regulations governing the constitution and administration of a particular provident fund.

The according and withdrawal of recognition.

58 B. (1) The Commissioner of Income-tax may accord recognition to any provident fund which in his opinion satisfies the conditions prescribed in section 58 C and the rules made thereunder and may at any time withdraw such recognition if in his opinion the provident fund contravenes any of those conditions.

(2) The Governor General in Council may at his discretion direct the Commissioner of Income-tax to refuse to accord recognition to any provident fund or may at any time withdraw recognition from any recognised provident fund.

(3) An order according recognition shall take effect on such date as the Commissioner may fix in accordance with any rules the Central Board of Revenue may make in this behalf, such date not being later than the last day of the financial year in which the order is made.

(4) An order withdrawing recognition shall take effect from the day on which it is made.

(5) An employer objecting to an order of the Commissioner refusing to recognise a provident fund may appeal within sixty days of such order to the Central Board of Revenue

The appeal shall be in the form and shall be verified in the manner prescribed by the Central Board of Revenue

Conditions to be satisfied by a recognised provident fund

58 C (1) In order that a provident fund may receive and retain recognition it shall satisfy the conditions set out below and any other conditions which the Governor General in Council may, by rule prescribe—

(*a*) All employees shall be employed in India or shall be employed by an employer whose principal place of business is in British India

(*b*) The contributions of an employee in any year shall be a definite proportion of his salary for that year and shall be deducted by the employer from the employee's salary in that proportion at each periodical payment of such salary in that year, and credited to the employee's individual account in the fund

(*c*) Subject to the provisions of section 58 D the contributions of an employer to the individual account of an employee in any year shall not exceed the amount of the contributions of the employee in that year and shall be credited to the employee's individual account at intervals not exceeding one year

(*d*) The fund shall consist of contributions as above specified of accumulations thereof and of interest (simple and compound) credited in respect of such contributions and accumulations and of securities purchased therewith and of no other sums

(*e*) The fund shall be vested in two or more trustees under a trust which shall not be revocable save with the consent of all the beneficiaries

(*f*) The employer shall not be entitled to recover any sum whatsoever from the fund save in cases where the employee is dismissed for misconduct or voluntarily leaves his employment otherwise than on account of ill health or other unavoidable cause before the expiration of the term of service specified in this behalf in the regulations of the fund

In such cases the recoveries made by the employer shall be limited to the contributions made by him to the individual account of the employee and to interest (simple and compound) credited in respect of such contributions and accumulations thereof in accordance with the regulations of the fund

(*g*) The accumulated balance due to an employee shall be payable on the day he ceases to be an employee of the employer maintaining the fund

(h) Save as provided in clause (g), or in accordance with such conditions and restrictions as the Governor General in Council may, by rules, prescribe no portion of the balance to the credit of an employee shall be payable to him

(2) Where there is a repugnance between any regulation of a recognised provident fund and any provision of this Chapter or of the rules made thereunder, the regulation shall, to the extent of the repugnance, be of no effect

The Commissioner may, at any time, require that such repugnance shall be removed from the regulations of the fund

Power to relax restrictions of employers contributions in certain cases

58 D Subject to any rules which the Governor General in Council may make in this behalf the Commissioner may, in respect of any particular fund, relax the provisions of condition (c) of sub section (1) of section 58 C—

(a) so as to permit the payment of larger contributions by an employer to the individual accounts of employees whose salary does not exceed five hundred rupees per mensem, and

(b) so as to permit the crediting by employers to the individual accounts of employees of periodical bonuses or other contributions of a contingent nature where the calculation and payment of such bonuses or other contributions is provided for on definite principles by the regulations of the fund

Annual accretion to be deemed income received

58 E The annual accretion in any year to the balance at the credit of an employee participating in a recognised provident fund shall be deemed to have been received by him in that year and shall be included in his total income for that year and subject to the exemptions specified in section 58 F, shall be liable to income tax and super tax

Provided that, for the purpose of sub section (2) of section 15, out of such annual accretion only the employee s own contributions shall be included in his total income

Exemption of annual accretion from income tax

58 F (1) An employee shall not be liable to pay income tax on contributions to his individual account in a recognised provident fund in so far as the aggregate of such contributions in any year does not exceed one sixth of his salary in that year

(2) In the accounts of a recognised provident fund the contributions exempted from income tax under sub section (1) and accumulations thereof shall be shown separately and interest thereon shall be calculated and shown separately Such interest

shall be exempt from payment of income tax, in so far as it is allowed at a rate not exceeding such rate as the Governor General in Council may, by notification in the Gazette of India, fix in this behalf

58 G (1) Where an employee participating in a recognised provident fund has rendered continuous service with his employer for a period of not less than five years and the accumulated balance due to him becomes payable such accumulated balance shall be exempt from payment of income tax and super tax and shall be excluded from the computation of his total income

Exemption of accumulated balance from income tax and super tax

Provided that the Commissioner of Income tax may allow such exemption and exclusion where the employee has rendered continuous service with the employer for a period of less than five years if in his opinion the service has been terminated by reason of the employee's ill health, or by the contraction or discontinuance of the employer's business or other cause beyond the control of the employee

(2) Where exemption from payment of income tax is not allowed under the provisions of sub section (1) the Income tax Officer shall calculate the total of the various sums of income tax from the payment of which the contributions and interest credited to the employee's individual account have been exempted under the provisions of sub sections (1) and (2) of section 58 F, and such total shall be payable by the employee in addition to any other income tax for which he may be liable for the year in which the accumulated balance due to him becomes payable

58 H The trustees of a recognised provident fund or other person authorised by the regulations of the fund to make payment of accumulated balances due to employees, shall at the time an accumulated balance due to an employee is paid deduct therefrom any income tax payable under sub section (2) of section 58 G and any income tax and super tax payable on an employee's total income as determined under sub section (3) of section 58 J, and sub sections (4) to (9) of section 18 shall apply as if the sum to be deducted were income tax payable under the head "Salaries

Deduction at source of income tax payable on accumulated balance due

58 I (1) The accounts of a recognised provident fund shall be maintained by the trustees of the fund and shall be in such form and for such periods and shall contain such particulars as the Central Board of Revenue may prescribe

Accounts of recognised provident funds

(2) The accounts shall be open to inspection at all reasonable times by Income tax authorities, and the trustees shall furnish to the Income tax Officer such abstracts thereof as the Central Board of Revenue may prescribe

58 J (1) Where recognition is accorded to a provident fund with existing balances, an account shall be made of the fund up to the day before the day on which the recognition takes effect, showing the balance to the credit of each employee on such day, and containing such further particulars as the Central Board of Revenue may prescribe

Treatment of balances in newly recognised provident funds

(2) The account shall also show in respect of the balance to the credit of each employee the amount thereof which is to be transferred to that employee's account in the recognised provident fund, and such amount (hereinafter called his transferred balance) shall be shown as the balance to his credit in the recognised provident fund on the date on which the recognition of the fund takes effect, and sub sections (3) and (4) shall apply thereto

Any portion of the balance to the credit of an employee in the existing fund which is not transferred to the recognised fund shall be excluded from the accounts of the recognised fund and shall be liable to income tax and super tax in accordance with the provisions of this Act other than this Chapter

(3) Subject to such rules as the Central Board of Revenue may make in this behalf, the Income tax Officer shall make a calculation of the aggregate of all sums comprised in a transferred balance which would have been liable to income tax if this Chapter had been in force from the date of the institution of the fund, without regard to any tax which may have been paid on any such sum, and such aggregate (if any) shall be deemed to be income received by the employee in the year in which the recognition of the fund takes effect, and shall be included in the employee's total income for that year, and, for the purposes of assessment, the remainder of the transferred balance shall be disregarded, but no other exemption or relief, by way of refund or otherwise, shall be granted in respect of any sum comprised in such transferred balance

Provided that, in cases of serious accounting difficulty, the Commissioner shall have power subject to the said rules, to make a summary calculation of such aggregate

(4) Notwithstanding anything contained in condition (h) of sub section (1) of section 58 C, an employee, in order to enable him to pay the amount of tax assessed on his total income as

determined under sub-section (3), shall be entitled to withdraw from the balance to his credit in the recognised provident fund a sum not exceeding *the difference between such amount and the* amount to which he would have been assessed if the transferred balance had not been included in his total income

(5) Nothing in this section shall affect the rights of the persons administering an unrecognised provident fund or dealing with it, or with the balance to the credit of any individual employee, before recognition is accorded, in any manner which may be lawful

Treatment of fund transferred by employer to trustee

58 K (1) Where an employer who maintains a provident fund (whether recognised or not) for the benefit of his employees and has not transferred the fund or any portion of it, transfers such fund or portion to trustees in trust for the employees participating in the fund, the amount so transferred shall be deemed to be of the nature of capital expenditure

(2) When an employee participating in such fund is paid the accumulated balance due to him therefrom, any portion of such balance as represents his share in the amount so transferred to the trustee (without addition of interest, and exclusive of the employee's contributions and interest thereon) shall be deemed to be an expenditure by the employer within the meaning of clause (*ia*) of sub section (2) of section 10, incurred in the year in which the accumulated balance due to the employee is paid

Provisions relating to rules

58 L (1) All rules made under this Chapter shall be subject to the provisions of sub sections (4) and (5) of section 59

(2) In addition to any power conferred by this Chapter, the Governor General in Council may make rules—

(*a*) prescribing the statements and other information to be submitted with an application for recognition,

(*b*) limiting the contributions to a recognised provident fund by employees of a company who are shareholders in the company,

(*c*) providing for the assessment by way of penalty of any consideration received by an employee for an assignment of, or creation of a charge upon, his beneficial interest in a recognised provident fund,

(*d*) determining the extent to and the manner in which exemption from payment of income tax and super tax may be granted in respect of contributions and interest credited to the individual accounts of employees in a provident fund from which recognition has been withdrawn, and

(c) generally, to carry out the purposes of this Chapter and to secure such further control over the recognition of provident funds and the administration of recognised provident funds as he may deem requisite

58 M This Chapter shall not apply to any provident fund to which the Provident Funds Act, 1925, applies

Application of this Chapter

CHAPTER X

MISCELLANEOUS

59 (1) The [31][Central Board of Revenue] may, subject to the control of the Governor General in Council, make rules for carrying out the purposes of this Act and for the ascertainment and determination of any class of income Such rules may be made for the whole of British India or for such part thereof as may be specified

Power to make rules

(2) Without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe the manner in which, and the procedure by which, the income, profits and gains shall be arrived at in the case of—

(i) incomes derived in part from agriculture and in part from business,

(ii) insurance companies,

(iii) persons residing out of British India,

(b) prescribe the procedure to be followed on applications for refunds,

(c) provide for such arrangements with His Majesty's Government as may be necessary to enable the appropriate relief to be granted under section 27 of the Finance Act, 1920,[32] or under section 49 of this Act,

(d) prescribe the year which, for the purpose of relief under section 49, is to be taken as corresponding to the year of assessment for the purposes of section 27 of the Finance Act, 1930,[32] and

(e) provide for any matter which by this Act is to be prescribed

[33][(3) In cases coming under clause (a) of sub section (2), where the income, profits and gains liable to tax cannot be defi

(31) The words "Central Board of Revenue" were substituted for the words "Board of Inland Revenue" by Act IV of 1924

(32) 10 & 11 Geo V, Ch 18

(33) Inserted by the Income tax (Amendment) Act, 1927 (XXVIII of 1917)

nitely ascertained, or can be ascertained only with an amount of trouble and expense to the assessee which, in the opinion of the Central Board of Revenue, is unreasonable, the rules made under that sub section may—

(a) prescribe methods by which an estimate of such income, profits and gains may be made, and

(b) in cases coming under sub clause (i) of clause (a) of sub section (2), prescribe the proportion of the income which shall be deemed to be income, profits and gains liable to tax, and an assessment based on such estimate or proportion shall be deemed to be duly made in accordance with the provisions of this Act]

(4) The power to make rules conferred by this section shall, except on the first occasion of the exercise thereof, be subject to the condition of previous publication

(5) Rules made under this section shall be published in the Gazette of India, and shall thereupon have effect as if enacted in this Act

Power to make exemptions etc

60 (1) The Governor General in Council may, by notification in the Gazette of India, make an exemption, reduction in rate or other modification, in respect of income tax in favour of any class of income, or in regard to the whole or any part of the income of any class of persons

(2) Where, by reason of any portion of an assessee's salary being paid in arrears or in advance, his income is assessed at a rate higher than that at which it would otherwise have been assessed, the Governor General in Council may grant such relief as he may think fit [34]

Appearance by authorised representative

61 Any assessee, who is entitled or required to attend before any income tax authority in connection with any proceedings under this Act, may attend either in person or by any person authorised by him in writing in this behalf

Receipts to be given.

62 A receipt shall be given for any money paid or recovered under this Act

Service of notices

63 (1) A notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a Court, under the Code of Civil Procedure, 1908 [35]

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(34) Sub section 2 was inserted and the old section renumbered as sub section (1) by Section 10 of Act XXII of 1930

(35) V of 1908

(2) Any such notice or requisition may, in the case of a firm or a Hindu undivided family, be addressed to any member of the firm or [36][to the] manager, or any adult male member of the family [37][and, in the case of any other association of individuals, be addressed to the principal officer thereof]

64 (1) Where an assessee carries on business at any place, he shall be assessed by the Income tax Officer of the area in which that place is situate or, where the business is carried on in more places than one, by the Income tax Officer of the area in which his principal place of business is situate

Place of assessment

(2) In all other cases, an assessee shall be assessed by the Income tax Officer of the area in which he resides

(3) Where any question arises under this section as to the place of assessment, such question shall be determined by the Commissioner, or, where the question is between places in more provinces than one, by the Commissioners concerned, or, if they are not in agreement, by the [Central Board of Revenue][38]

Provided that, before any such question is determined, the assessee shall have had an opportunity of representing his views

(4) Notwithstanding anything contained in this section, every Income-tax Officer shall have all the powers conferred by or under this Act on an Income tax Officer in respect of any income, profits or gains accruing, or arising or received within the area for which he is appointed

65 Every person deducting, retaining or paying any tax in pursuance of this Act in respect of income belonging to another person is hereby indemnified for the deduction, retention or payment thereof

Indemnity

66 (1) If, in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under Chapter VIII, a question of law arises, the Commissioner may, either on his own motion or on reference from any Income tax authority subordinate to him, draw up a statement of the case and refer it with his own opinion thereon to the High Court

Statement of case by Commissioner to High Court

(2) Within [39][sixty days of the date on which he is served with notice] of an order under section 31 or section 32 [40][or of a decision by a Board of Referees under section 33 A], the assessee

(36) These words were substituted for the words on the' by S 2 and Sch I of Act VII of 1924

(37) These words were inserted by S 9 of Act XI of 1924

(38) These words were substituted for the words Board of Inland Revenue" by S 4 and Sch of Act IV of 1924

(39) The portions in brackets were substituted by S 11 of Act XXII of 1930

(40) The portions in brackets were inserted by S 11 of Act XXI of 1930

in respect of whom the order [or decision][41] was passed may, by application accompanied by a fee of one hundred rupees or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order [or decision][41] and the Commissioner shall, within [sixty days] of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court

Provided that, if, in exercise of his power of revision[42] under section 33, the Commissioner decides the question, the assessee may withdraw his application, and if he does so, the fee paid shall be refunded

(3) If, on any application being made under sub section (2), the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may [43][within six months from the date on which he is served with notice of the refusal] apply to the High Court, and the High Court, if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state the case and to refer it, and, on receipt of any such requisition, the Commissioner shall state and refer the case accordingly

(4) If the High Court is not satisfied that the statements in a case referred under this section are sufficient to enable it to determine the question raised thereby, the Court may refer the case back to the Commissioner by whom it was stated to make such additions thereto or alterations therein as the Court may direct in that behalf

(5) The High Court upon the hearing of any such case shall decide the questions of law raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Commissioner by whom the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Commissioner shall dispose of the case accordingly, or, if the case arose on a reference from any Income tax authority subordinate to him, shall forward a copy of such judgment to such authority who shall dispose of the case conformably to such judgment

(6) Where a reference is made to the High Court on the application of an assessee, the costs shall be in the discretion of the Court

(41) The portions in brackets were inserted by S 11 of Act XXI of 1930
(42) The word "revision" was substituted for the word "review" by S 11 of Act III of 1928
(43) These words were inserted by S 10 of Act XI of 1924

(7) Notwithstanding that a reference has been made under this section to the High Court, income tax shall be payable in accordance with the assessment made in the case

Provided that, if the amount of an assessment is reduced as a result of such reference, the amount overpaid shall be refunded with such interest as the Commissioner may allow

[44][(8) For the purposes of this section "the High Court" means—

(a) in relation to the North West Frontier Province and British Baluchistan, the High Court of Judicature at Lahore,

(b) in relation to the province of Ajmer Merwara, the High Court of Judicature at Allahabad, and

(c) in relation to the province of Coorg, the High Court of Judicature at Madras]

[45][66 A

References to be heard by Benches of High Courts and appeal to lie in certain cases to Privy Council

(1) When any case has been referred to the High Court under section 66, it shall be heard by a Bench of not less than two Judges of the High Court, and in respect of such case the provisions of section 98 of the Code of Civil Procedure, 1908,[46] shall, so far as may be, apply notwithstanding anything contained in the Letters Patent of any High Court established by Letters Patent or in any other law for the time being in force

(2) An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under section 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council

(3) The provisions of the Code of Civil Procedure, 1908,[46] relating to appeals to His Majesty in Council shall, so far as may be, apply in the case of appeals under this section in like manner as they apply in the case of appeals from decrees of a High Court

Provided that nothing in this sub section shall be deemed to affect the provisions of sub section (5) or sub section (7) of section 66

Provided, further, that the High Court may, on petition made for the execution of the order of His Majesty in Council in respect of any costs awarded thereby, transmit the order for execution to any Court subordinate to the High Court

(4) Where the judgment of the High Court is varied or reversed in appeal under this section, effect shall be given to the order of His Majesty in Council in the manner provided in sub-

(44) This sub section was added by S 7 of Act XXIV of 1926

(45) This section was inserted by S 8 of ibid

(46) V of 1908

sections (5) and (7) of section 66 in the case of a judgment of the High Court

(5) Nothing in this section shall be deemed—

(*a*) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

(*b*) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee]

Bar of suits in Civil Court

67 No suit shall be brought in any Civil Court to set aside or modify any assessment made under this Act, and no prosecution, suit or other proceeding shall lie against any Government officer for anything in good faith done or intended to be done under this Act

Computation of periods of limitation

67 A In computing the period of limitation prescribed for an appeal under this Act or for an application under section 66, the day on which the order complained of was made, and the time requisite for obtaining a copy of such order, shall be excluded [47]

68[48] * * * * *

EXTRACT FROM THE INDIAN FINANCE ACT, 1930

1 (1) This Act may be called THE INDIAN FINANCE ACT, 1930

* * * * * *

6 (1) Income tax for the year beginning on the 1st day of April, 1930, shall be charged at the rates specified in Part I of the Third Schedule

(2) The rates of super tax for the year beginning on the 1st day of April 1930 shall for the purposes of section 55 of the Indian Income tax Act 1922 be those specified in Part II of the Third Schedule

(3) For the purposes of the Third Schedule "total income" means total income as determined for the purposes of income tax or super tax, as the case may be, in accordance with the provisions of the Indian Income tax Act, 1922

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SCHEDULE III

(*See Section* 6)

PART I

RATES OF INCOME TAX

	Rate
I In the case of every individual Hindu undivided family unregistered firm and other association of individuals not being a registered firm or a company —	
(1) When the total income is less than Rs 2000	Nil

(47) Section 67 A was inserted by section 12 of Act XXII of 1930

(48) Repealed by the Repealing Act XII of 1927

EXTRACTS FROM FINANCE ACT OF 1931.

Section 7. (1) Income-tax for the year beginning on the 1st day of April 1931 shall be charged at the rates specified in Part I of the Fourth Schedule

Income tax and Super tax

(2) The rates of super-tax for the year beginning on the 1st day of April, 1931, shall for the purposes of section 55 of the Indian Income tax Act, 1922 be those specified in Part II of the Fourth Schedule

(3) For the purpose of the Fourth Schedule, "total income" means total income as determined for the purposes of income tax or super tax as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922

SCHEDULE IV

(See *Section* 7)

PART I

RATES OF INCOME TAX

A In the case of every individual Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—

	Rate
(1) When the total income is less than Rs 2,000	*Nil*
(2) When the total income is Rs 2 000 or upwards, but is less than Rs 5 000	Six pies in the rupee
(3) When the total income is Rs 5,000 or upwards, but is less than Rs 10 000	Nine pies in the rupee
(4) When the total income is Rs 10 000 or upwards but is less than Rs 15 000	One anna in the rupee
(5) When the total income is Rs 15 000 or upwards, but is less than Rs 20,000	One anna and four pies in the rupee
(6) When the total income is Rs 20 000 or upwards, but is less than Rs 30,000	One anna and seven pies in the rupee
(7) When the total income is Rs 30,000 or upwards, but is less than Rs 40,000	One anna and eleven pies in the rupee
(8) When the total income is Rs 40 000 or upwards, but is less than Rs 1,00,000	Two annas and one pie in the rupee
(9) When the total income is Rs 1 00,000 or upwards	Two annas and two pies in the rupee

B In the case of every company and registered firm, whatever its total income — Two annas and two pies in the rupee

PART II

RATES OF SUPER TAX.

In respect of the excess over thirty thousand rupees of total income—

(1) in the case of every company—

	Rate
(a) in respect of the first twenty thousand rupees of such excess	*Nil*
(b) for every rupee of the remainder of such excess	One anna in the rupee

(2) (a) in the case of every Hindu undivided family—

(i) in respect of the first forty five thousand rupees of such excess	*Nil.*
(ii) for every rupee of the next twenty five thousand rupees of such excess	One anna and three pies in the rupee.

	Rate
(b) in the case of every individual unregistered firm and other association of individuals not being a registered firm or a company—	
(i) for every rupee of the first twenty thousand rupees of such excess	Nine pies in the rupee
(ii) for every rupee of the next fifty thousand rupees of such excess	One anna and three pies in the rupee
(c) in the case of every individual Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(i) for every rupee of the next fifty thousand rupees of such excess	One anna and nine pies in the rupee
(ii) for every rupee of the next fifty thousand rupees of such excess	Two annas and three pies in the rupee
(iii) for every rupee of the next fifty thousand rupees of such excess	Two annas and nine pies in the rupee
(iv) for every rupee of the next fifty thousand rupees of such excess	Three annas and three pies in the rupee
(v) for every rupee of the next fifty thousand rupees of such excess	Three annas and nine pies in the rupee
(vi) for every rupee of the next fifty thousand rupees of such excess	Four annas and three pies in the rupee
(vii) for every rupee of the next fifty thousand rupees of such excess	Four annas and nine pies in the rupee
(viii) for every rupee of the next fifty thousand rupees of such excess	Five annas and three pies in the rupee
(ix) for every rupee of the next fifty thousand rupees of such excess	Five annas and nine pies in the rupee
(x) for every rupee of the remainder of such excess	Six annas and three pies in the rupee.

This Bill has been consented to by the Council of State

H MONCRIEFF SMITH,

The 30th March 1931 *President Council of State*

I assent to this Bill

IRWIN,

The 30th March 1931 *Viceroy and Governor General.*

This Act has been made by me as Governor General under the provisions of section 67-B of the Government of India Act

IRWIN,

MONDAY, *the 30th March*, 1931 *Viceroy and Governor General.*

Whereas I Edward Frederick Lindley Baron Irwin, am of opinion that a state of emergency exists which justifies the direction by me that the Indian Finance Act, 1931, being an Act made by me under the provisions of section 67 B of the Government of India Act, shall come into operation forthwith

Now, THEREFORE, in exercise of the power conferred by the proviso to sub section (2) of that section, I do hereby direct accordingly.

IRWIN,

The 30th March, 1931. *Viceroy and Governor General*

E GRAHAM,

Secretary to the Government of India

EXTRACTS FROM THE SUPPLEMENTARY FINANCE ACT, 1931

WHEREAS it is expedient to supplement the Indian Finance Act 1931, and to extend the operation of its temporary provisions to the financial year beginning on the 1st April 1932 It is hereby enacted as follows —

Short title

1 This Act may be called the INDIAN FINANCE (SUPPLEMENTARY AND EXTENDING) ACT, 1931

Extension to the next financial year of the operation of the temporary provisions of the Indian Finance Act 1931

2 The operation of section 2 of the Indian Finance Act, 1931, fixing the rate of salt duty for the year beginning on the 1st April 1931 of section 5 of the said Act and the Third Schedule thereto as amended by section 6 of this Act, fixing inland postage rates for the said year and of section 7 of the said Act and the Fourth Schedule thereto as amended by sections 7, 8 and 9 of this Act fixing rates of income tax and super tax for the said year, is hereby extended to the 31st day of March, 1933

Lowering of limits of total income liable to income tax

7 (1) In Part I of Schedule IV to the Indian Finance Act 1931, for the item—

"When the total income is less than Rs 2 000 *Nil*" the following shall be substituted namely,—

"When the total income is Rs 1 000 or upwards but is less than Rs 2 000 Four pies in the rupee"

Provided that for the year beginning on the 1st day of April, 1931, the rate chargeable on any such total income shall be two pies in the rupee only

(2) For the purpose of assessing and collecting the tax imposed by the proviso to sub section (1),—

(*a*) the Indian Income tax Act, 1922 shall be deemed to be subject to the adaptations set out in Part I of Schedule II to this Act, and

(*b*) the Central Board of Revenue may make rules—

(*i*) making such further adaptations in the Indian Income tax Act 1922, as may seem to it to be necessary to secure that the tax shall be equitably levied, and

(*ii*) regulating the procedure of income tax authorities in securing the assessment and collection of the tax and the granting of refunds arising therefrom

Additional income tax and super tax for the current financial year

8 (1) In respect of the year beginning on the 1st day of April, 1931, each rate of income tax and super tax specified in Schedule IV to the Indian Finance Act, 1931, excluding the rate imposed by section 7, shall be increased by one eighth of its amount

(2) For the purpose of assessing and collecting the additional tax imposed by sub section (1),—

(*a*) the Indian Income tax Act, 1922, shall be deemed to be subject to the adaptations set out in Part II of Schedule II to this Act, and

(*b*) the Central Board of Revenue may make rules—

	Rate
(ix) for every rupee of the next fifty thousand rupees of such excess	Five annas and seven pies in the rupee
(x) for every rupee of the remainder of the excess	Six annas and one pie in the rupee

THE INDIAN INCOME TAX RULES 1922

Board of Inland Revenue Notification No 3 I T dated the 1st April 1922 as subsequently amended

In exercise of the powers conferred by section 59 of the Indian Income tax Act 1922 (XI of 1922) the Board of Inland Revenue has made the following rules namely —

1 These rules may be called THE INDIAN INCOME TAX RULES 1922

2 Any firm constituted under an instrument of partnership specifying the individual shares of the partners may for the purposes of clause (14) of section 2 of the Indian Income tax Act 1922 (hereinafter in these rules referred to as the Act) register with the Income tax Officer the particulars contained in the said instrument on application in this behalf made by the partners or by any of them Such application shall be made—

(a) before the income of the firm is assessed for any year under section 23 or

(b) if no part of the income of the firm has been assessed for any year under section 23 before the income of the firm is assessed under section 34 or

(c) with the permission of the Assistant Commissioner hearing an appeal under section 30 before the assessment is confirmed reduced enhanced or annulled or if the Assistant Commissioner sets aside the assessment and directs the Income tax Officer to make a fresh assessment before such fresh assessment is made

3 The application referred to in rule 2 shall be made in the form annexed to this rule and shall be accompanied by the original instrument of partnership under which the firm is constituted together with a copy thereof provided that if the Income tax Officer is satisfied that for some sufficient reason the original instrument cannot conveniently be produced he may accept a copy of it certified in writing by one of the partners to be a correct copy and in such a case the application shall be accompanied by a duplicate copy

FORM I

Form of application for registration of a firm under section 2 (14) of the Indian Income tax Act 1922

To

THE INCOME TAX OFFICER

Dated 19

I/We ———————————— beg to apply for the registration of my/our firm under section 2 (14) of the Indian Income tax Act 1922

2 The original / A certified copy of the instrument of partnership under which the firm is constituted specifying the individual shares of the partners together

with $\frac{\text{a copy}}{\text{duplicate copy}}$ is enclosed The prescribed particulars are given below

3 $\frac{I}{We}$ do hereby certify that the profits of the current year will be actually divided or credited in accordance with the shares shown in this partnership deed

Signature——————

Address——————

Name and address of the firm	Names of the partners in the firm with the share of each in the business	Date on which the instrument of partnership was executed	Date, if any, on which the instrument of partnership was registered in the Income tax Officer's office	REMARKS

$\frac{I}{We}$ do hereby certify that the information given above is correct

Signature (s)——————

4 (1) On the production of the original instrument of partnership or on the acceptance by the Income tax Office of a certified copy thereof, the Income tax Officer shall enter in writing at the foot of the instrument or copy as the case may be the following certificate namely —

This instrument of partnership (or this certified copy of an instrument of partnership) has this day been registered with me the Income tax Officer for in the province of under clause (14) of section 2 of the Indian Income tax Act 1922 This certificate of registration has effect from the day of April 19 up to the 31st day of March 19 '

(2) The certificate shall be signed and dated by the Income tax Officer who shall thereupon return to the applicant the instrument of partnership or the certified copy thereof as the case may be and shall retain the copy or duplicate copy thereof

5 The certificate of registration granted under rule 4 shall have effect from the date of registration

6 A certificate of registration granted under rule 4 shall have effect up to the end of the financial year in which it is granted but shall be renewed by the Income tax Officer from year to year on application made to him in that behalf and accompanied by a certificate signed by one of the partners of the firm that the constitution of the firm as specified in the instrument of partnership remains unaltered Such application shall be made within the time and subject to the conditions if any which are specified in clause (*a*) clause (*b*) or clause (*c*), as the case may be of rule 2

7 Under section 9 (1) (*ii*) of the Act the sum to be allowed in respect of collection charges shall not exceed 6 per cent of the annual value of the property

8 An allowance under section 10 (2) (vi) of the Act in respect of depreciation of buildings machinery, plant or furniture shall be made in accordance with the following statement —

Class of buildings machinery plant or furniture	Rate	REMARKS
	Percentage on prime cost	
1 *Buildings** —		* Double these rates may be allowed for buildings used in industries which cause special deterioration such as chemical works soap and candle works paper mills and tanneries
(1) First class substantial buildings of selected materials	2½	
(2) Buildings of less substantial construction	5	
(3) Purely temporary erections such as wooden structures	10	
2 *Machinery Plant or Furniture* † —		† The special rates for electrical machinery given below may be adopted at firm's option for that portion of their machinery
General rate	5	
Rates sanctioned for special industries —		
Flour Mills Rice Mills Bone Mills Sugar Works Distilleries Ice Factories Aerating Gas Factories Match Factories	6 1/4	
Paper Mills Ship Building and Engineering Works Iron and Brass Foundries Aluminium Factories Electrical Engineering Works Motor Car Repairing Works Galvanizing Works Patent Stone Works Oil Extraction Factories Chemical Works Soap and Candle Works Lime W[illegible] Works Furniture Cement Works	7 1/2	
[illegible] Ianufacture Tile [illegible] Glass Factories Telephone Companies Mines and Quarries Tube Well Boring Plant Concrete Pile Driving Machines	10	
Sewing machines for canvas or leather	12 1/2	
Motor cars used solely for the purpose of business indigenous sugarcane crushers (Kohlus or Belnas)	15	
Motor taxi Motor Lorries and Motor Buses	20	
Ropeway ropes and trestle sheaves and connected parts	25	
Ropeway structures		
(1) Trestle and station steel work	5	
(2) Driving and tension gearing	7 1/2	
(3) Carriers	10	
3 *Electrical Machinery* —		
(a) Batteries	15	
(b) Other electrical machinery including electrical generators motors (other than tramway motors) switch gear and instruments transformers and other stationary plant and wiring and fittings of electric light and fan installations	7 1/2	

Class of buildings, machinery plant or furniture.	Rate.	REMARKS.
	Percentage on prime cost	
(c) Underground cables and wires .	6	
(d) Overhead cables and wires ..	2 1/2	
4 *Hydro Electric concerns* — Hydraulic works, pipe lines sluices, and all other items not otherwise provided for in this statement.	2 1/2	
5 *Electric tramways* —		
Permanent way —		
(a) Not exceeding 50,000 car miles per mile of track per annum	6 1/4	
(b) Exceeding 50 000 and not exceeding 75,000 car miles per mile of track per annum	7 1/7	
(c) Exceeding 75,000 and not exceeding 125,000 car miles per mile of track per annum	8 1/3	
Cars—car trucks car bodies electrical equipment and motors	7	
General plant, machinery and tools ..	5	
6 *Mineral Oil concerns* —		
A Refineries—		
(1) Boilers ..	10	
(2) Prime movers ..	5	
(3) Process plant ..	10	
B Field operations—		
(1) Boilers ..	10	
(2) Prime movers ..	5	
(3) Process plant ..	7 1/2	
Except for the following items —		
(1) Below ground—All to be charged to revenue ..	..	
(2) *Above ground*—		
(a) Portable boilers, drilling tools, well head tank, rigs, etc.	25	
(b) Storage tanks ..	10	
(c) Pipe lines—		
(i) Fixed boilers ..	10	
(ii) Prime movers ..	7 1/2	
(iii) Pipe line ..	10	
7 *Ships*—		
(1) Ocean —		
(a) Steam ..	5	
(b) Sail or tug ..	4	

8 An allowance under section 10 (2) (*vi*) of the Act in respect of depreciation of buildings machinery, plant or furniture shall be made in accordance with the following statement —

Class of buildings machinery plant or furniture	Rate	REMARKS
	Percentage on prime cost	
1 *Buildings** —		* Double these rates may be allowed for buildings used in industries which cause special deterioration such as chemical works soap and candle works paper mills and tanneries
(1) First class substantial buildings of selected materials	2½	
(2) Buildings of less substantial construction	5	
(3) Purely temporary erections such as wooden structures	10	
2 *Machinery Plant or Furniture* † —		† The special rates for electrical machinery given below may be adopted at firm's option for that portion of their machinery
General rate	5	
Rates sanctioned for special industries —		
Flour Mills Rice Mills Bone Mills Sugar Works Distilleries Ice Factories Aerating Gas Factories Match Factories	6 1/4	
Paper Mills Ship Building and Engineering Works Iron and Brass Foundries *Aluminium Factories Electrical* Engineering Works Motor Car Repairing Works Galvanizing Works Patent Stone Works Oil Extraction Factories Chemical Works Soap and Candle Works Lime Works Saw Mills Dyeing and Bleaching Works Furniture and Plant in hotels and boarding houses Cement Works using rotary kilns	7 1/2	
Plant used in connection with Brick Manufacture Tile making Machinery Optical Machinery Glass Factories Telephone Companies Mines and Quarries Tube Well Boring Plant Concrete Pile Driving Machines	10	
Sewing machines for canvas or leather	12 1/2	
Motor cars used solely for the purpose of business indigenous sugarcane crushers (Kohlus or Belnas)	15	
Motor taxis Motor Lorries and Motor Buses	20	
Ropeway ropes and trestle sheaves and connected parts	25	
Ropeway structures		
(1) Trestle and station steel work	5	
(2) Driving and tension gearing	7 1/2	
(3) Carriers	10	
3 *Electrical Machinery* —		
(*a*) Batteries	15	
(*b*) Other electrical machinery including electrical generators motors (other than tramway motors) switch *gear and instruments transformers and other stationary* plant and wiring and fittings of electric light and fan installations	7 1/2	

I——————————declare that to the best of my information and belief the buildings machinery plant and furniture described in column 1 of the above statement were the property of—————— during the year ended——————and that the particulars entered in the statement are correct and complete

Place——————

Signature——————

Date—————— *Designation*——————

10 All sums deducted in accordance with the provisions of section 18 of the Act shall be paid by the person making the deduction to the credit of the Government of India on the same day as the deduction is made in the case of deduction by or on behalf of Government and within one week from the date of such deduction in all other cases

Provided that the Income tax Officer may in special cases and with the approval of the Assistant Commissioner permit a local authority company public body or association or a private employer to pay the income tax deducted from salaries quarterly on June 15th September 15th December 15th and March 15th

11 In the case of income chargeable under the head ' Salaries ' where deduction is not made by or on behalf of Government the person paying the salary shall pay to the credit of the Government of India by remitting the amount to the Income tax Officer concerned or to such officer as he may direct and shall send therewith a statement showing the name of the employee from whose salary the tax has been deducted the period for which the salary has been paid the gross amount of the salary the deduction for a provident fund or insurance premia and the amount of tax deducted

11 A The prescribed rate of exchange for the calculation of the value in rupees of any income chargeable under the head ' Salaries ' which is payable to the assessee out of India by or on behalf of Government shall be the rate notified by the Controller of the Currency in respect of the recovery of contributions to the Indian Civil Service Fund for the month in which such income is payable

12 In the case of income chargeable under the head ' Interest on securities ' where the deduction is not made by or on behalf of Government the person responsible for paying the interest shall pay to the credit of the Government of India by remitting the amount to the Income tax Officer concerned or to such officer as he may direct with a statement showing the following particulars —

(*i*) Description of securities
(*ii*) Numbers of securities
(*iii*) Dates of securities
(*iv*) Amounts of securities
(*v*) Period for which interest is drawn
(*vi*) Amount of interest and
(*vii*) Amount of tax

13 The certificate to be furnished under section 18 (9) of the Act by any person paying interest chargeable to income tax on any security

Class of buildings machinery, plant or furniture	Rate	REMARKS
7 *Ships*—(*Contd*)	Percentage on prime cost	
(2) Inland—		
(*a*) Steamers (over 120 ft in length)	5	
(*b*) Steamers including cargo launches (120 ft in length and under)	6	
(*c*) Tug boats	7 1/2	
(*d*) Iron or Steel flats for cargo etc	5	
(*e*) Wooden cargo boats up to 50 tons capacity	10	
(*f*) Wooden cargo boats over 50 tons capacity	7 1/2	
(*g*) Motor launches	7 1/2	
8 *Mines and Quarries*—		
(1) Railway sidings* (excluding rails)	5	* Depreciation on rails used for tramways and sidings and in inclines where the rails are the property of the assessee is allowed at 10 per cent under item 2 above (plant used in connection with Mines and quarries) in addition to any depreciation allowance on the cost of constructing the tramways sidings or inclines
(2) Shafts	5	
(3) Inclines*	5	
(4) Tramways on the surface* (excluding rails)	10	

9 For the purpose of obtaining an allowance for depreciation under proviso (*a*) to section 10 (2) (*vi*) of the Act, the assessee shall furnish particulars to the Income tax Officer in the following form —

Description of buildings machinery plant or furniture	Original cost	Capital expenditure during the year for additions alterations improvements and extensions	Date from which used for the purposes of the business	Particulars (including original cost depreciation allowed and value realised by sale or scrap value) of *obsolete machinery plant* or furniture sold or discarded during the year with dates on which first brought into use and sold or discarded	REMARKS
1	1 A	2	3	4	5

I———————————declare that to the best of my information and belief the buildings machinery plant and furniture described in column 1 of the above statement were the property of——————— during the year ended——————————and that the particulars entered in the statement are correct and complete

Place——————

Signature——————

Date—————— *Designation*——————

10 All sums deducted in accordance with the provisions of section 18 of the Act shall be paid by the person making the deduction to the credit of the Government of India on the same day as the deduction is made in the case of deduction by or on behalf of Government and within one week from the date of such deduction in all other cases

Provided that the Income tax Officer may in special cases and with the approval of the Assistant Commissioner permit a local authority, company public body or association or a private employer to pay the income tax deducted from salaries quarterly on June 15th September 15th December 15th and March 15th

11 In the case of income chargeable under the head 'Salaries' where deduction is not made by or on behalf of Government the person paying the salary shall pay to the credit of the Government of India by remitting the amount to the Income tax Officer concerned or to such officer as he may direct and shall send therewith a statement showing the name of the employee from whose salary the tax has been deducted the period for which the salary has been paid, the gross amount of the salary, the deduction for a provident fund or insurance premia, and the amount of tax deducted

11 A The prescribed rate of exchange for the calculation of the value in rupees of any income chargeable under the head 'Salaries' which is payable to the assessee out of India by or on behalf of Government shall be the rate notified by the Controller of the Currency in respect of the recovery of contributions to the Indian Civil Service Fund for the month in which such income is payable

12 In the case of income chargeable under the head 'Interest on securities' where the deduction is not made by or on behalf of Government the person responsible for paying the interest shall pay to the credit of the Government of India by remitting the amount to the Income tax Officer concerned or to such officer as he may direct with a statement showing the following particulars

(i) Description of securities
(ii) Number of securities
(iii) Dates of securities
(iv) Amounts of securities
(v) Period for which interest is drawn,
(vi) Amount of interest, and
(vii) Amount of tax

13 The certificate to be furnished under section 20 (0) of the Act by any person paying interest chargeable to income tax on any security

of the Government of India or of a local Government shall be in the following form —

Draft No [49]———————————————— ——————

Certified that Rs ————————————being income tax at the rate of—pies per rupee has been deducted by draft of this date from Rs ————————————*being the amount of interest*

for Rs

on[50]—————for Rs————————————standing in the name

for Rs

of———————————————— ——————

————————192 *Superintendent or Principal Officer*

(To be signed by the claimant)

I hereby declare that the securities on which interest as above specified has been received were my own property and were in the possession of————————————————————

at the time when income tax was deducted

Signature——————

Date——————

(*N B*—The securities to be produced when required in support of any claim)

13 A The certificate to be furnished under section 18 (9) of the Act by the person paying any interest on debentures or other securities for money issued by or on behalf of a local authority or a company shall be in the following form —

" Name of $\frac{\text{Local Authority}}{\text{Company}}$——————

Address——————————

To——————————— ——————

$\frac{I}{We}$ hereby certify that Rs being income tax at the rate of

(*N B* —The securities to be produced when required in support of any claim)

14 The certificate to be furnished by the principal officer of a company under section 20 shall be in the following form

(Name of Company)——————

(Address of Company) ——————

Date——————

WARRANT for Rs (in words and figures or if the certificate is crossed by an entry in words stating that the amount of dividend is under the next multiple of Rs 50 above that amount in figures only) being dividend[3] at the rate of Rs (in words and figures) per share for the[4] ending on the day of 19 [5] on[6] shares in this company, registered in the name of

This dividend was declared at the[7] meeting held on the[8] 192

$\frac{I}{We}$ hereby certify that income tax —— other than [illegible] be charged [illegible] Indian Income tax of the profits and gains of the company of which this dividend forms a part, has been or will be duly paid by $\frac{me}{us}$ to the Government of India

Signature——————
Office——————

(To be signed by the claimant)

I hereby certify that the dividend above mentioned relates to shares which were my own property at the time when the dividend was declared and were in the possession of

Signature——————
Date——————

15 The returns for Government officers under section 21 of the Act shall be prepared and submitted to the Income tax Officer by —

(*a*) Civil Audit Officers for all gazetted officers and others who draw their pay from audit offices on separate bills, and also for all pensioners who draw their pensions from audit offices

(*b*) Treasury officers for all gazetted officers and others who draw their pay from treasuries on separate bills without countersignature, and also for all pensioners who draw their pensions from treasuries

(*c*) Heads of Civil or Military offices for all non gazetted officers whose pay is drawn on establishment bills or on bills countersigned by the head of office

---

(3) Or dividend and bonus
(4) Year or half year, as the case may be
(5) Here enter whether free of income tax or not
(6) Here enter number and denomination of shares
(7) Here specify number and nature of meeting
(8) Here enter date.

(*d*) Forest Disbursing Officers and Public Works Department Disbursing Officers in cases where direct payment from treasuries is not made, for themselves and their establishments

(*e*) Head postmasters for (*i*) themselves, their gazetted subordinates and the establishments of which the establishment pay bills are prepared by them and (*ii*) gazetted supervising and controlling officers of whose headquarters post office they are in charge, Head Record Clerks, Railway Mail Service, for themselves and all the staff whose pay is drawn in their establishment pay bills, the Disbursing Officers in the case of the Administrative and the Audit offices

(*f*) *Controllers of Military Accounts* (*including Divisional, Military* Supply, Marine, Field and War Controllers) for all gazetted military officers under their audit

(*g*) Disbursing officers in the Military Works Department for themselves and their establishments

(*h*) Chief Examiners of Accounts or Chief Auditors of Railways concerned for all railway employees under their audit

16 The minimum income under the head "Salaries" referred to in section 21 (*a*) shall be Rs. 2,000 per annum

17 The return to be delivered to the Income tax Officer under section 21 of the Act shall be in the following form —

Serial number	Name of persons	Postal address of residence	Appointment or nature of employment	Total amount of salary wages annuity or pension paid during the year ending on the 31st March 19	House allowance or value of rent free quarters	Amount of bonus gratuity, fees commissions perquisites or allowances (other than those shown in column 6) or profits in lieu of or in addition to salary or wages (each to be shown separately)	Total of columns 5 6 and 6 A	Deductions on account of Provident and other funds [Proviso to sec. 7(1)]	Deductions on account of Life Insurance Premia (section 15)	Net amount chargeable	Amount of tax payable	Reduction under section 17	Amount of tax deducted	Whether person contributes to a recognised provident fund (Chapter IX A)	REMARKS
1	2	3	4	5	6	6 A	7	8	8 A	9	10	11	12	12 A	13

I certify that the above statement contains a complete list of the total amounts paid by——————to all persons who were receiving income on the 31st day of March, 19 —at the rate of Rs 2,000 per annum, or have received during the year ended on that day not less than Rs 2,000 in respect of salary, wages, annuity, *pension*, gratuity, fees,

commissions perquisites, or profits in lieu of or in addition to salary or wages, and that all the particulars stated are correct

Signature of person by whom the return is delivered.

Date

18 (1) The return of total income of companies required under section 22 (1) shall be in the following form and shall be accompanied by a copy of the profit and loss account referred to therein —

Income, profits or gains from business, trade, commerce

	RS A P
Income, profits or gains as per Profit and Loss Account for the year ended————————192	
Add any amount debited in the accounts in respect of—	
1 Reserve for bad debts	
2 Sums carried to reserve for provident or other funds	
3 Expenditure of the nature of charity or presents	
4 Expenditure of the nature of capital	
5 Income tax or super tax	
6 Rental value of property owned and occupied	
7 Cost of additions to or alterations extensions improvements of any of the assets of the business	
8 Interest on reserve or other funds	
9 Losses sustained in former years	
10 Losses recoverable under an insurance or contract of indemnity	
11 Depreciation of any of the assets of the business	
12 Expenses not incurred solely for the purpose of earning the profits	
TOTAL	
Deduct—Any profits included in the accounts already charged to Indian income tax and the interest on securities of the Government of India or of local Governments declared to be income tax free	
BALANCE	

If the company owns any property not occupied for the purposes of the business a statement in the form prescribed in Schedule A to rule 19 should be attached with particulars of the credit and debit on account of such property entered in the accounts

Declaration

I, the——————————————— [Secretary, etc, (see section 2 (12) of the Act)] of the———————————————————————(name of Company) declare that the information against each head in this return is correctly given as shown in the books of the Company as also in the accounts which have been duly audited by the auditors of the Company and which have been adopted by the shareholders of the Company

(Signature)——————————

(Designation)——————————

Dated——————19 .

(2) The company shall also attach to the return a statement showing the sums charged in the accounts under the provisions of section 58-K (2).

19 The return of total income for individuals, firms, Hindu undivided families and other associations of individuals not being companies required under section 22 (2) shall be in the following form —

Statement of total income during the previous year.

1		2	3
Sources of Income		Amount of profits or gains or income during the previous year	Tax already charged on the income
		Rs	Rs
1 Salaries (including wages, annuity, pension, gratuity, fees, commission, allowances, perquisites, including rent free quarters) or profits received in lieu of, or in addition to, salary *or wages*	*[See note (1)]*		
1 A The contributions made by an employer to the account in a recognised provident fund of the person making the return			
1 B The interest accruing to the account mentioned in 1-A which is not exempt from income-tax [Section 58 F (2)]			
2 *Interest on Securities (including debentures) already taxed*	" (2)		
3 Interest on Securities of the Government of India or of local Governments *declared to be income tax free*	" (3)		
4 Property as shown in detail in Schedule A . . .	" (4)		
5 Business, trade, commerce, manufacture, *or dealings in* property, shares or securities (details as in note 5) ..	" (5)		
6 Profession	" (6)		

1	2	3
Sources of Income	Amount of profits or gains or income during the previous year	Tax already charged on the income
	sR	Rs
7 *Dividends from companies (Net)* *[See note (7)]*		
8 Interest on mortgages, loans, fixed deposits, current account, etc, not being income from business		
9 Ground rent		
10 Any source other than those mentioned above including any income earned in partnership with others [See note (8)]		
Total		
Deductions claimed —		
(*a*) on account of insurance premia		
(*b*) on account of contributions to a provident fund to *which the Provident Funds Act applies,*		
(*c*) on account of contributions to a recognised provident fund [section 58 A (*a*)]		
(*d*) others		

I declare that to the best of my knowledge and belief the information given in the above statement is correct and complete, that the amounts of income shown are truly stated and relate to the year ended——

and that no other income accrued or arose or was received by me / the firm / the family / the association

during the said year and that I / the firm / the family / the association have no other sources of income

Signature——————

Date——————

N B —(*a*) *Income accruing to you outside British India received in British India is liable to taxation, and must be entered by you in the form*

(*b*) *All income from whatever source derived must be entered in the form, including income received by you as a partner of a firm*

Note 1 —In column 2 should be shown the gross amount of salary and not the net amount after deduction on account of income tax, provident funds, etc

Note 2 —"Interest on securities" means the interest on promissory notes or bonds issued by the Government of India or a Local Government or the interest on debentures or other securities for money issued by or on behalf of a local authority or Company Where income tax has been deducted from the interest, or where the interest has been paid income tax free, the amount of tax so deducted or paid should be added to the amount of interest actually received, and the gross amount so arrived at should be entered in column 2 of the statement The term "interest on securities" does not include interest on fixed deposits or mortgages or other loans, which have to be shown under heading 8

The interest on securities of the Government of India or of Local Governments declared to be income tax free should be shown under head 3 Those which are not declared to be income tax free should be included under this head

Entries under this head must be supported by the certificate issued by the person or Company paying the interest under section 18 (9) of the Act

Note 3—(*a*) The income tax payable on the interest receivable on a security of a Local Government issued income tax free is payable by the Local Government and not by the holder of the security

(*b*) Only the interest on securities of the Government of India or of a Local Government declared *to be income tax free should* be entered against this head Such interest will not be charged to income tax, but it must be included in the statement of total income in order to ascertain the rate of income tax chargeable on other income *It is chargeable to super tax*

(*c*) Particulars of any interest on securities issued by other authorities and stated to be free of income tax should be entered against head *2*, as income tax on such interest is actually paid by these authorities on behalf of the recipients

Note 4—The tax is payable under this head in respect of the *bona fide* annual value of any building or lands appurtenant thereto of which you are the owner, other than such portions of such buildings and lands as you may occupy for the purpose of your business

SCHEDULE A

Serial number	Name of village or *town* where the property is situated	Name of mohalla or street and number of property if any	In the case of Municipalities the name of the person in whose name the property stands in the *municipal* registers	Whether the *property* is occupied by owner or is let	Annual letting value of the property	Period during which the property remained vacant	Amount of rent actually received for the property if let	DEDUCTIONS								Net amount to be carried over to the front of the *form*
								One sixth of the annual letting value shown in column 6	Premium paid to insure the property against *damage or* destruction	Interest paid on a *mortgage or charge* on the property	Ground rent paid for the property	Land revenue paid for the property	Collection charges paid	Amount claimed on account of property remaining vacant	Total *of* columns 8 to 13 A	
1	2	3	4	5	6	6 A	7	8	9	10	11	12	13	13 A	14	15

Note 5—(*a*) Where you keep your accounts on the mercantile accountancy or book profits system, you must file return in the following form:—

Income, profits or gains from business, trade, commerce

	Rs
Income, profits or gains as per profit and loss account for the year ended————193 ..	..
Add any amount debited in the accounts in respect of—	
1. Reserve for bad debts .	..
2 Sums carried to reserve for provident or other funds	..
3 Expenditure of the nature of charity or presents .	..
4 Expenditure of the nature of capital	.
5 Income tax or Super-tax .	..
6 Drawings or salary of proprietor or partners ..	..
7 Rental value of property owned and occupied	..
8 Cost of additions to, or alterations, extensions, improvements of any of the assets of the business	.
9 Interest on the proprietor's or partner's capital including interest on reserve or other funds ..	.
10 Losses sustained in former years	..
11 Losses recoverable under an insurance or contract of indemnity	..
12 Depreciation of any of the assets of the business	.
13 Private or personal expenses and expenses not incurred solely for the purpose of earning the profits .	..
TOTAL .	..
Deduct any profits included in the account already charged to Indian income tax and the interest on securities of the Government of India or of local Governments declared to be income tax free	
BALANCE	..

(Signature of the person making the return) ————

(Date)————193

(*b*) Where you do not keep your accounts in such a form, you must file a statement showing how you arrive at the taxable profits, *i e*, showing details of the gross receipts and of the expenditure you propose to set against those receipts No deductions are permissible on account of—

(*i*) Property owned and occupied by the owner of a business for the purposes of a business,

(*ii*) Additions to or alterations, extensions, or improvements of any of the assets of the business,

(*iii*) Interest on the capital of the proprietors or partners of the business;

(iv) Bad debts not actually written off in the accounts;

(v) Losses sustained in previous years,

(vi) Reserves of any kind;

(vii) Sums paid on account of the income-tax or super tax or any tax levied by a local authority other than local rates or municipal taxes in respect of the portion of the premises used for the purpose of the business,

(viii) Any expenditure of the nature of charity or a present,

(ix) Any expenditure of the nature of capital,

(x) Any loss recoverable under an insurance or a contract of indemnity;

(xi) Depreciation of any kind other than that specified in the Act;

(xii) Drawings or salaries of the proprietors or the partners,

(xiii) Private or personal expenses of the assessee,

(xiv) Any expenditure of any kind which is not incurred solely for the purpose of earning the profits

If you have included any such sums in your expenditure in your books, you must exclude them from the expenditure permissible for the purpose of arriving at your taxable profits

(c) You are also required to attach a statement showing the sums charged in your accounts under the provisions of section 58 K (2)

Note 6—The income, profits or gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred *solely* for the purpose of such profession or vocation, provided that no allowance is made on account of any of your personal expenses Professional fees received by you in any part of India (whether within British India or not) must be included by you in your receipts.

Note 7—Income tax chargeable on the profits of companies is paid by the companies, so that the dividends which shareholders receive represent the net amount remaining after any income tax due by the company has been paid This amount should be entered in column 2 of the statement The proportionate tax will be added in the Income tax office

If the rate of tax applicable to your total income is less than the rate of tax applicable to the profits or gains of the company at the time of the declaration of such dividends, you may, by attaching the company's certificate received with the dividends, have the excess collected on your dividends from the company set against the tax payable by you on your other income instead of having to apply separately for a refund.

Note 8—Agricultural income from land not paying land revenue or local rates *to an authority in British India should be included under this head*

Note 9.—Deductions from total income can only be made for insurance premia in respect of insurance on your own life or on the life of your wife, or in respect of a contract for a deferred annuity on your own life or on the life of your wife. No deduction is permissible in the case of any other form of insurance except in the case of Hindu undivided families where deductions are permissible on account of premia paid in respect of insurance on the life of any male member of the family or of his wife The original receipt or the certificate of the insurance company to which the premium was paid must be attached to the return.

20. The Notice of Demand under section 29 shall be in the following form:—

Notice of Demand under Section 29 of the Income-tax Act, 1922.

To

____

____

____

1 You have been assessed for the year to income tax amounting to Rs [in addition to which a penalty of Rs has been imposed], as shown in the copy of the Assessment form sent herewith

2 You have also been assessed to super tax amounting to Rs

3 You are required to pay the amount of Rs on or before the to at when you will be granted a receipt

4 If you do not pay the tax on or before the date specified above, you will be liable to a penalty which may be as great as the tax due from you

5 If you are dissatisfied with your assessment you may present an *appeal under sub section (1) of section 30 of the Indian Income tax Act,* 1922, to the Assistant Commissioner of Income tax at within 30 days from the receipt of this notice on a petition duly stamped in the form prescribed under sub section (3) of section 30 and verified as laid down in that form

Or

The assessment has been made under sub section (4) of section 23 of the Indian Income tax Act 1922, because you

'failed'	to make a return of your income under section 22 to comply with a notice under sub section (4) of section 22 to comply with a notice under sub section (2) of section 23	and no appeal lies

But if you were prevented by sufficient cause from making the return or did not receive the notice (s) aforesaid or had not a reasonable opportunity to comply or were prevented by sufficient cause from complying with the terms of the notice (s) you may apply to me within one month from the receipt of this notice under section 27 to cancel the assessment and proceed to make a fresh assessment

6 The appropriate chalan should be sent along with the amount paid Should you lose the chalans attached to this notice of demand it will be necessary for you to apply to the Income tax Officer for copies of fresh chalans

Dated——————19

Income tax Officer

(Place)——————

Note—The superfluous words in paragraph 5 should be deleted

ASSESSMENT FORM.

ASSESSMENT FOR 193 -3 , UNDER SECTION , ACT XI OF 1922.

District or Area.

Number in General Index.
Number in Miscellaneous Record.
Name of assessee
Address

Serial number	Detailed sources of income	Amount of income	Tax deducted at source		REMARKS
		RS	RS	A	
1	Salary (including employee's provident fund contribution) ..				
1 A	Annual accretion (less employee's provident fund contribution) under Section 58 A (f) ..				
2	Interest on securities ..				
3	Property .				
4	Business .				
5	Profession				
6	Other sources .				

	RS	A	RS	A
(i) Total income				
(ii) Deduction under Section 7 (1) or on account of provident fund to which the Provident Fund Act 1897 applies				
(iii) Deduction on account of recognised provident fund — (a) Contributions (b) Exempted interest				
(iv) Deduction account of insurance premia				
(v) Deduct sums received as dividends or from a firm the profits of which have been charged to tax				
(vi) Deduct amount of interest from tax free securities of the Government of India or of a Local Government ..				
(vii) Income now to be taxed				
(viii) Rate applicable—pies per rupee .. .				
(ix) Amount of tax				
(x) Deduction under Section 17 ..				
(xi) Amount of deductions at source from salary or interest on securities for which credit is given under section 18 (5)				
(xii) Abatement on account of dividends (at....pies per rupee)				
(xiii) Abatement on account of income from a registered firm (at. ..pies per rupee)				
(xiv) Net amount of income tax (or refund)				
(xiv a) Amount of super tax				
(xv) Penalty under section 28 [or section 25 (2)] ..				
(xvi) Total sum payable (or to be refunded) (in figures as well as in words) .. .. .. Rupees Annas				

Dated————193 .   *Income-tax Officer.*

Classification of demand.

Serial No	Classification	Amount of tax	
		Rs	A
1	Salaries— (a) Paid by Government (b) „ a local authority (c) „ companies, other bodies and associations (d) „ private employers		
2	*Interest on securities— (a) on securities of the Government of India (b) „ „ local Governments (c) on debentures and other securities of a local authority or company		
3	Income derived from property		
4	„ „ „ business		
5	Professional earnings		
6	Income derived from other sources		
	TOTAL		
	Deduction on account of section 7 (1), 15 or 58 F		
	Deduction on account of section 17		
	Total of refunds and rebates as in the classification cage below		
	Penalty under section 25 (2)		
	„ „ „ 28		
	Net demand (or refund)		

*Where the result of an assessment is an abatement the sum allowed as a refund or rebate should be entered in the classification cage below

†Classification of refunds and rebates

Source of income	Rate of refund or rebate	Amount of refund or rebate	
		RS	A

†Items (xii) and (xiii) on pre page and abatement regarding securities

Record of cash refunds

Date of issue of notice of demand	
Number of voucher Date of voucher Amount of refund Reason for refund	

*Return

N = Not submitted

A — Submitted and accepted

R = Submitted but assessment not based on it

*Accounts

N = Not submitted

A — Submitted and accepted

R = Submitted but assessment not based on them

*NOTE—For the purpose of compiling Annual Return No VIII I T Os should invariably strike out the inapplicable entries

* * * * * *

21 An appeal under section 30 shall in the case of an appeal against a refusal of an Income tax Officer to make a fresh assessment under section 27 be in Form A in the case of an appeal against an order of an Income tax Officer under section 25 (2) in Form C in the case of an appeal against an order of an Income tax Officer under section 28 in Form D and in other cases in Form B

FORM A

Form of appeal against an order refusing to re open an assessment under section 27

To

The Assistant Commissioner of
The day of 19
The petition of of Post Office District
sheweth as follows —

1 Under the Indian Income tax Act 1922 your petitioner has been assessed on the sum of Rs for the year commencing the first day of April 19

2 Your petitioner was prevented by sufficient cause from making the return required by section 22 or did not receive the notice issued under sub section (4) of section 22 or sub section (2) of section 23, or had not a reasonable opportunity to comply or was prevented by sufficient cause from complying with the terms of the notice under sub section (4) of section 22 or sub section (2) of section 23, as more particularly specified in the statement attached

3 Your petitioner therefore presented a petition to the Income tax Officer under section 27, requesting him to cancel the assessment This

petition, the Income tax Officer, by his order dated of which a copy is attached, has rejected

4 Your petitioner therefore requests that the order of the Income-tax Officer may be set aside and that he may be directed to make a fresh assessment in accordance with the law

(Signed)————————

STATEMENT OF FACTS

Form of verification

I, , the petitioner named in the above petition, do declare that what is stated therein and in the above statement of facts is true to the best of my information and belief

(Signed)————————

FORM B

Form of appeal against assessment to Income tax

To

The Assistant Commissioner of

The day of 19

The petition of of Post Office, District sheweth as follows —

1 Under the Indian Income tax Act 1922 your petitioner has been assessed on the sum of Rs for the year commencing the 1st day of April 19 The notice of demand attached hereto was served upon him on

2 Your petitioner s income accruing or arising or received or deemed under the provisions of the Act to accrue or arise or to be received in British India for the year ending the day of 19 amounted to Rs

3 Such income and profits actually accrued or arose or were received during the period of months and days

4 During the said year your petitioner had no other income or profits

5 Your petitioner has made a return of his income to the Income tax Officer under section 22 sub section (2) of the Act and has complied with all the terms of the notice served on him by the Income tax Officer under section 23 (2) and|or [section 22 (4)]

Your petitioner therefore prays that he may be assessed accordingly (or that he may be declared not to be chargeable under the Act)

(Signed)————————

GROUNDS OF APPEAL

Form of verification

I , the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief

(Signed)————————

FORM C

Form of appeal against an order under section 25 (2)

To

The Assistant Commissioner of Income tax,

The day of 19 .

The petition of of Post Office District, sheweth as follows —

1 Under section 25 (2) of the Indian Income tax Act, 1922, a penalty of Rs has been imposed on your petitioner The notice of demand attached hereto was served upon him on

2 Your petitioner was prevented by sufficient cause as more particularly explained below from giving notice within the time prescribed by section 25 (2) to the Income tax Officer of the discontinuance of his business profession or vocation

3 Your petitioner therefore requests that the order of the Income tax Officer imposing a penalty of Rs upon your petitioner may be set aside

(Signed)————————

STATEMENT OF FACTS

Form of verification

I, , the petitioner named in the above petition, do declare that what is stated therein and in the above statement of facts is true to the best of my information and belief

(Signed)————————

FORM D

Form of appeal against an order under section 28

To

The Commissioner of Income tax,
The Assistant Commissioner of Income tax,

The day of 19

The petition of of Post Office, District, sheweth as follows —

1 Under section 28 of the Indian Income tax Act 1922, a penalty of Rs has been imposed on your petitioner by the Income tax Officer / Assistant Commissioner The notice of demand attached hereto was served upon him on

2 Your petitioner did not conceal the particulars of his income or deliberately furnish inaccurate particulars thereof but as will be seen from the statement of facts attached returned it at its real amount to the best of his knowledge and belief

3 Your petitioner therefore requests that the order of the Income tax Officer / Assistant Commissioner imposing a penalty of Rs upon your petitioner may be set aside

(Signed)————————

STATEMENT OF FACTS

Form of verification

I the petitioner named in the above petition do declare that what is stated therein is true to the best of my information and belief

(Signed)——————

22 An appeal under section 32 (2) shall in the case of an appeal against an order of an Assistant Commissioner under section 28 be in Form D attached to Rule 21 and in other cases in Form E

FORM E

To

The Commissioner of Income tax

The day of 19

The petition of sheweth as follows —

1 Under section 31 (3) of the Indian Income tax Act 1922 the Assistant Commissioner of——————has increased the tax payable by your petitioner from Rs ——————to Rs——————

2 Your petitioner prays that the enhancement may be set aside or reduced to Rs ——————for the reasons stated below

(Signed)——————

Grounds of appeal

Form of verification

I the petitioner named in the above petition do declare that what is stated therein is true to the best of my information and belief

(Signed)——————

23 (1) In the case of income derived in part from agriculture and in part from business an assessee shall be entitled to deduct from such income the market value of any agricultural produce raised by him or received by him as rent in kind which he has utilized as raw material for the purposes of his business or the sale receipts of which are included in the accounts of his business The balance of such income shall be deemed to be income derived from the business and no further deduction shall be made therefrom in respect of any expenditure incurred by the assessee as a cultivator or receiver of rent in kind

(2) For the purposes of sub rule (1) market value shall be deemed to be —

(a) where agricultural produce is ordinarily sold in the market in its raw state or after application to it of any process ordinarily employed by a cultivator or receiver of rent in kind to render it fit to be taken to market the value calculated according to the average price at which it has been so sold during the year previous to that in which the assessment is made

(b) where agricultural produce is not ordinarily sold in the market in its raw state the aggregate of—

(i) the expenses of cultivation

(ii) the land revenue or rent paid for the area in which it was grown and

(iii) such amount as the Income tax Officer finds having regard to all the circumstances in each case to represent a reasonable rate of profit on the sale of the produce in question as agricultural produce

24 Income derived from the sale of tea grown and manufactured by the seller in British India shall be computed as if it were income derived from business and 40 per cent of such income shall be deemed to be income profits and gains liable to tax

25 In the case of Life Assurance Companies incorporated in British India whose profits are periodically ascertained by actuarial valuation the income profits and gains of the Life Assurance Business shall be the average annual net profits disclosed by the last preceding valuation provided that any deductions made from the gross income in arriving at the actuarial valuation which are not admissible for the purpose of income tax assessment and any Indian Income tax deducted from or paid on income derived from investments before such income is received shall be added to the net profits disclosed by the valuation

26 Rule 25 shall apply also to the determination of the income profits and gains derived from the annuity and capital redemption business of life assurance companies the profits of which can be ascertained from the results of an actuarial valuation

27 If the Indian income tax deducted from interest on the investments of a company exceeds the tax on the income profits and gains thus calculated a refund may be permitted of the amount by which the deduction from interest on investments exceeds the tax payable on such income profits and gains

28 In the case of other classes of insurance business (fire marine motor car burglary etc) of a company incorporated in British India the income profits or gains shall be determined in accordance with the provisions of the Act subject to the allowance specified in the rule next following

29 If in the ordinary accounts of any insurance business other than Life Assurance Annuity or Capital Redemption Business carried on by an Insurance Company any amount is actually charged against the receipts for the sole purpose of forming a reserve to meet outstanding liabilities or unexpired risk in respect of policies which have been issued (including risk of exceptional losses) and is not used for any other purpose such amount may be treated as expenditure incurred solely for the purpose of earning the profits of the business

30 Any amount either written off in the accounts or through the Actuarial Valuation Balance Sheet to meet depreciation of or loss on securities or other assets or which is carried to a reserve fund formed for that sole purpose and not used for any other purpose may be treated as expenditure incurred solely for the purpose of earning the profits of

the business Any sums taken credit for in the accounts or Actuarial Valuation Balance Sheet on account of appreciation of or gains on the securities or other assets shall be demed to be income chargeable to tax, subject always to deduction of such portion thereof as has been otherwise taken into account in calculating the income profits or gains

31 The income profits and gains of companies carrying on Dividing Society or Assessment business shall be taken at 15 per cent of the premium income in the previous year and in the case of non resident companies at 15 per cent of the Indian premium income in the previous year

32 Notwithstanding anything contained in rules ? to 31 the total income however of an insurance company carrying on more than one class of business shall be determined by its aggregate income from all classes of businesses

33 In any case in which the Income tax Officer is of opinion that the actual amount of the income profits or gains accruing or arising to any person residing out of British India whether directly or indirectly through or from any business connection in British India cannot be ascertained the amount of such income profits or gains for the purposes of assessment to income tax may be calculated on such percentage of the turnover so accruing or arising as the Income tax Officer may consider to be reasonable or on an amount which bears the same proportion to the total profits of the business of such person (such profits being computed in accordance with the provisions of the Indian Income tax Act) as the receipts so accruing or arising bear to the total receipts of the business or in such other manner as the Income tax Officer may deem suitable

34 The profits derived from any business carried on in the manner referred to in section 42 (2) of the Act may be determined for the purposes of assessment to income tax according to the preceding rule

35 The total income of the Indian branches of non resident insurance companies (Life Marine Fire Accident Burglary Fidelity Guarantee etc) in the absence of more reliable data may be deemed to be the proportion of the total income profits or gains of the companies corresponding to the proportion which their Indian premium income bears to their total premium income

36 In the case of a person resident in British India an application for a refund of income tax under section 48 of the Act shall be made in the following form —

Application for refund of income tax

I   of

do hereby state that my total income computed in accordance with section 16 of the Indian Income tax Act XI of 1922 accruing or arising or received in British India or deemed under the Act to accrue or arise or to be received in British India during the year ending on the 31st March 19   amounted to Rs   only

I therefore pray for a refund of

(The portions not required should be scored out)	Rs	under	Salaries
	Rs	under	Securities
	Rs	under	Dividends from companies"

Rs under Share of profits of the registered firm ' known as of which I am a partner

Signature

I hereby declare that I am resident in British India and that what is stated in this application is correct

Dated 19

Signature

36 A In the case of a person not resident in British India an application for a refund of income tax under section 48 of the Act shall be made in the following form —

Application for refund of income tax

I, of
residing at in *(country)*
do hereby state that my total income computed in accordance with section 48 (4) of the Indian Income tax Act, 1922 *during the year ending* on the 31st March 19 amounted to Rs only, as per return enclosed

I therefore pray for a refund of

(The portions not required should be scored out)

Rs under Salaries
Rs under Securities
Rs under Dividends from companies
Rs under Share of profits of the registered firm known as of which I am a partner

Signature

I hereby declare that I am a

I also declare that what is stated

Dated 19

Signature

Sworn before me (Name)
Designation Signature at on

Seal

Note 1—*The above declaration shall be sworn (a) before* a Justice of the Peace or a Notary Public (or a Commissioner for Oaths) if the applicant for refund resides in any part of His Majesty s Dominions outside British India (*b*) before a Magistrate or other official of the State or a Political Officer if he resides in a State in India (*c*) before a British *Consul if he resides elsewhere*

Note 2— British subject means a person who is a natural born British subject, or a person to whom a certificate of naturalization has been granted

37 The application under rule 36 shall be accompanied by a return of total income in the form prescribed under section 22 unless the applicant has already made such a return to the Income tax Officer

37 A The application under *Rule 36 A shall* be accompanied by a return of total income in the following form the details of Part I of which but not the total may be omitted if the person has already submitted a return under section 22 (2) for the same year

PART I

Statement of total income accruing or arising or received in British India, or deemed under the Act to accrue or arise or to be received in British India, during the previous year

1		2	3
Sources of income		Amount of profits or gains or income during the previous year	Tax already charged on the income
1 Salaries (including wages, annuity, pension gratuity fees, commission, allowances perquisites including rent free *quarters) or profits received in lieu of*, or in addition to, salary or wages	[See note (1)]	Rs	Rs A
1 A The contributions made by an employer to the account in a recognised provident fund of the person making the return			
1 B The interest accruing to the account mentioned in 1 A, which is not exempt from income tax [Section 58 F (2)]			
2 Interest on securities (including debentures) already taxed	" (2)		
3 Interest on securities of the Government of India or of local Governments declared to be income tax free	" (3)		
4 Property as shown in detail in Schedule A	" (4)		
5 Business, trade, commerce, manufacture, or dealings in property, shares or securities (details as in note 5)	" (5)		
6 Profession	" (6)		
7 Dividends from Companies	" (7)		
8 Interest on mortgages, loans fixed deposits, current accounts etc, not being income from business			
9 Ground rent			
10 Any source other than those mentioned above including any income earned in partnership with others	[See note (8)]		
	TOTAL		
Deductions claimed — (*a*) on account of insurance premia (*b*) on account of contributions to a provident fund to which the Provident Fund Act applies, (*c*) on acount of contributions to a recognised provident fund Section 58 A (*a*), (*d*) others	[See note (9)]		

PART II

Statement of total income, profits and gains in the previous year, arising accruing or received out of British India which if arising accruing or received in British India would be included in the computation of total income under section 16

Name of Country	Sources of income		Amount of profits or gains or income during the previous year
	1 Salaries *	(see Note 10)	Rs
	2 Securities *	(see Note 11)	
	3 *Property* *	(see Note 12)	
	4 Business *	(see Note 13)	
	5 Profession *	(see Note 14)	
	6 Dividends from companies *	(see Note 15)	
	7 Interest on securities other than in item 2 above mortgages *loans fixed deposits current accounts* etc not being income from business *	(see Note 16)	
	8 Ground rent *		
	9 *Any source other than those mentioned above* including any income earned in partnership with others	(see Note 17)	
		Total	
	Total as per Part I Total as per Part II Grand total		Rs

* The figures for each country should be separately shown

Verification

I declare that to the best of my knowledge and belief the information given in the above statement is correct and complete, that the amounts of income shown are truly stated and relate to the year ended and that no other income accrued or arose or was received by $\frac{\text{me}}{\text{the firm}}$ during the said year and that $\frac{\text{I}}{\text{the firm}}$ have no other sources of income

Date *Signature*

N B—(*a*) Income accruing to you outside British India received in British India, should be entered in Part I and not in Part II

(*b*) All income from whatever source derived must be entered in the form including income received by you as a partner of a firm

(*c*) "Previous year" means the twelve months ending on the 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st day of March then at the option of the assessee the year ending on the day to which his accounts have so been made up

---

NOTE 1—In column 2 should be shown the gross amount of salary and not the net amount after deductions on account of income tax, provident funds etc

---

NOTE 2—"Interest on securities" means the interest on promissory notes or bonds issued by the Government of India or a local Government, or the interest on debentures or other securities for money issued by or on behalf of a local authority or company Where income tax has been deducted from the interest or where the interest has been paid income tax free, the amount of tax so deducted or paid should be added to the amount of interest actually received and the gross amount so arrived at should be entered in column 2 of the statement The term "interest on securities" does not include interest on fixed deposits or mortgages or other loans which have to be shown under heading 8

The interest on securities of the Government of India or of local Governments declared to be income tax free should be shown under head 3 Those which are not declared to be income tax free should be included under this head

Entries under this head must be supported by the certificate issued by the person or company paying the interest under section 18 (9) of the Act

---

NOTE 3—(*a*) The income tax payable on the interest receivable on a security of a local Government issued income tax free is payable by the local Government and not by the holder of the security

(*b*) Only the interest on securities of the Government of India or of a local Government declared to be income tax free should be entered against this head Such interest will not be charged to income tax but

it must be included in the statement of total income in order to ascertain the rate of income tax chargeable on other income *It is chargeable to super tax*

(*c*) *Particulars of any interest* on securities issued by other authorities and stated to be free of income tax should be entered against head 2 as income tax on such interest is actually paid by these authorities on behalf of the recipients

---

NOTE 4 —The tax is payable under this head in respect of the *bona fide* annual value of any buildings or lands appurtenant thereto, of which you are the owner, other than such portions of such buildings and lands as *you may occupy for the purpose of your business*

SCHEDULE A

Serial number	Name of village or town where the property is situated	Name of street and number of property	In the case of municipalities the name of the person in whose name the property stands in the municipal registers	Whether the property is occupied by owner or is let	Annual letting value of the property	Period during which the property remained vacant	Amount of rent actually received for the property if let	Deductions: One sixth of the annual letting value shown in column 6	Premium paid to insure the property against damage or destruction	Interest paid on a mortgage or charge on the property	Ground rent paid for the property	Land revenue paid for the property	Collection charges paid	Amount claimed on account of property remaining vacant	Total of columns 8 to 13 and 13 A	Net amount to be carried over to the front of the form
1	2	3	4	5	6	6 A	7	8	9	10	11	12	13	13 A	14	15

NOTE 5 —(*a*) Where you keep your accounts on the mercantile accountancy or book profits system, you must file a return in the *following* form —

Income, profits or gains from business, trade, commerce.

	Rs	A
Income, profits or gains as per Profit and Loss Account for the year ended 192		
Add any amount debited in the accounts in respect of—		
1 *Reserve for bad debts*		
2 Sums carried to reserve for provident or other funds		
3 Expenditure of the nature of charity or presents		
4 Expenditure of the nature of capital		
5 Income tax or Super tax		
6 Drawings or salary of proprietor or partners		
7 Rental value of property owned and occupied		
8 Cost of additions to, or alterations extensions, improvements of, any of the assets of the business		
9 Interest on the proprietor's or partner's capital, including interest on reserve or other funds		
10 Losses sustained in former years .		
11 Losses recoverable under an insurance or contract of indemnity		
12 Depreciation of any of the assets of the business		
13 Private or personal expenses and expenses not incurred solely for the purpose of earning the profits		
TOTAL		
Deduct —Any profits included in the account already charged to Indian income tax and the interest on securities of the Government of India or of local Governments declared to be income tax free		
Balance ..		

(Signature of the person making the return)

Dated 192

(*b*) Where you do not keep your accounts in such a form, you must file a statement showing how you arrive at the taxable profits *i e*, showing details of the gross receipts and of the expenditure you propose to set against those receipts No deductions are permissible on account of—

(*i*) Property owned and occupied by the owner of a business for the purposes of a business,

(*ii*) Additions to, or alterations extensions or improvements of, any of the assets of the business,

(*iii*) Interest on the capital of the proprietors or partners of the business,

(*iv*) Bad debts not actually written off in the accounts,

(*v*) Losses sustained in previous years,

(*vi*) Reserves of any kind,

(*vii*) Sums paid on account of the income tax or super tax or any tax levied by a local authority other than local rates or municipal taxes in respect of the portion of the premises used for the purpose of the business,

(*viii*) Any expenditure of the nature of charity or a present,

(*ix*) Any expenditure of the nature of capital,

(*x*) Any loss recoverable under an insurance or a contract of indemnity,

(*xi*) Depreciation of any kind other than that specified in the Act,

(*xii*) Drawings or salaries of the proprietors or the partners,

(*xiii*) Private or personal expenses of the assessee,

(*xiv*) Any expenditure of any kind which is not incurred solely for the purpose of earning the profits

If you have included any such sums in your expenditure in your books you must exclude them from the expenditure permissible for the purpose of arriving at your taxable profits

(*c*) You are also required to attach a statement showing the sums charged in your accounts under the provisions of section 58 K (2)

NOTE 6—The income profits or gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred *solely* for the purpose of such profession or vocation provided that no allowance is made on account of any of your personal expenses Professional fees received by you in any part of India (whether within British India or not) must be included by you in your receipts

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NOTE 7—Income tax chargeable on the profits of companies is paid by the companies so that the dividends received by share holders represent the net amount remaining after any income tax due by the company has been paid This amount should be entered in column 2 of the statement The proportionate tax will be added in the Income tax Office

If the rate of tax applicable to your total income is less than the rate of income tax applicable to the profits or gains of the company at the time of the declaration of such dividends, you may, by attaching the company's certificate received with the dividends have the excess collected on your dividends from the company set against the tax payable by you on your other income instead of having to apply separately for a refund

Where a company derives a part of its profits in British India and part outside British India, such portion of its dividend as is payable

out of profits taxable in British India should be shown in Part I under item 7 and the balance in Part II under item 6

NOTE 8—Agricultural income from land not paying land revenue or local rates to an authority in British India should be included under this head

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NOTE 9—Deductions from total income can only be made for insurance premia in respect of insurance on your own life or on the life of your wife, or in respect of a contract for a deferred annuity on your own life or on the life of your wife No deduction is permissible in the case of any other form of insurance except in the case of Hindu undivided families where deductions are permissible on account of premia paid in respect of insurance on the life of any male member of the family or of his wife The original receipt or the certificate of the insurance company to which the premium was paid must be attached to the return

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NOTE 10—The gross amount of salary and not the net amount after deductions on account of income tax, provident fund, etc, should be shown.

NOTE 11—Under this head should be shown interest on securities issued by the Government of India or a local Government or a local authority in India on which interest is paid or payable outside British India and the interest on debentures of companies operating in India paid or payable outside British India For this purpose "Company" means "a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession, and includes any foreign association carrying on business in British India whether incorporated or not and whether its principal place of business is situate in British India or not, which the Central Board of Revenue *may, by general or special order declare to be a company for the purposes* of this Act" Interest on all other securities should be shown under item 7—see Note 16 Interest should be shown gross if foreign tax is deducted therefrom after the assessee receives the interest, if the tax is deducted at source, the net interest received should be shown

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NOTE 12—See instructions in Note 4

NOTE 13—The details should be given as explained in Note 5 but there will be no "deduct" entry on account of profits included in the amount already charged to Indian income tax and the interest on securities of the Government of India or a local Government in India declared to be income tax free

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NOTE 14—This should show professional fees received outside British India

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NOTE 15—The figure to be shown here is the amount actually received by the share holder irrespective of whether the dividends are declared free of tax or not

Where a company derives a part of its profits in British India and part outside British India such portion of its dividend as is payable out of profits taxable in British India should be shown in Part I under item 7 and the balance in Part II under item 6

NOTE 16—This head will include *inter alia* interest on all securities other than those entered in item 2 see Note 11 Interest should be shown gross if foreign tax is deducted therefrom after the assessee receives the interest if the tax is deductd at source the net interest received should be shown

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NOTE 17—Agricultural income from land not included in Part I *should be shown under this head*

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38 Where the application under rule 36 or rule 36 A is made in respect of interest on securities or dividends from companies the application shall be accompanied by the certificate prescribed under section 18 (9) or section 20 as the case may be

39 The application under rule 36 or rule 36 A shall be made as follows —

(*a*) If the applicant is resident in British India to the Income tax Officer of the district in which the applicant is chargeable directly to income tax or if he is not chargeable directly to income tax to the Income tax Officer of the district in which he ordinarily resides

(*b*) If the applicant is resident outside British India to the Income tax Officer appointed by the Central Board of Revenue

40 An application for refund of income tax under section 49 of the Act shall be made in the following form —

Application for relief from double income tax under section 49 *of the Indian Income tax Act* 1922

I ———————— of ———————— do hereby state that I have paid United Kingdom income tax and super tax amounting to £—— for the year ending 19 on an income of £———— and that Indian (income tax / income tax and super tax) of Rs ———has also been paid on (the same income / income from the same source amounting to Rs) ———I have obtained relief under the provisions of section 27 of the English Finance Act 1920 at the rate of————see attached certificate from the Inspector of Taxes ———————— I now pray for a further relief at the rate of ————amounting to Rs ————————under section 49 of the Indian

Income tax Act, 1922 to which I am entitled My income from all sources to which this Act applies during the "previous year" ending on the ———19 amounted to Rs ———only—*see* Return of income $\frac{\text{attached}}{\text{already submitted}}$

Signature———

I hereby declare that what is stated herein is correct

Signature———

Dated———19

41 The application under rule 36 or rule 40 may be presented by the applicant in person or through a duly authorized agent or may be sent by post

42 A return shall be furnished by the principal officer of a company under section 19 A in respect of a dividend or aggregate dividends if the amount thereof exceeds Rs 10 000

43 The return by the principal officer of a company under section 19 A shall be in the following form and shall be delivered to the Income tax Officer who assesses the company —

Return under section 19 *A of the Indian Income tax Act*, 1922, *for the year* 1*st April* 19 —31*st March* 19

Name of Company———

Address of Company———

———

(1) $\frac{\text{Resident Shareholders}}{\text{Non Resident Shareholders}}$ ———

Serial number	Name of share holder	Address of share holder	Date of declaration of dividends	(2) Amount of dividends	
				Net	Gross
1	2	3	4	5	6
				Rs	Rs

I,——— the principal officer of the——— company hereby certify that the above statement contains a complete list

Note—(1) Separate forms should be used for resident and non resident share holders

(2) Where dividends are issued "free of income tax" the figure to be entered in column 5 is the sum actually paid and the figure to be entered in column 6 is the aggregate of the sum so paid and the amount of income tax payable by the company in respect of the dividends

of the $\frac{\text{resident}}{\text{non resident}}$ shareholders of the company to whom a dividend or aggregate dividends exceeding Rs 10 000 was or were distributed in the period from the 1st April 19 to the 31st March 19

Signature——————

Dated——————19

44 All sums deducted in accordance with sub sections (2) and (3) of section 57 shall be paid by the person making the deduction to the credit of the Government of India within one week from the date of such deduction by remitting the amount to the Income tax Officer concerned or to such Government Treasury or branch of the Imperial Bank of India as he may direct The preson making the deduction shall send at the same time to the Income tax Officer a statement showing the name of the non resident person on whose behalf the tax has been deducted the amount of the tax deducted the gross amount of dividend in respect of which the deduction has been made and the period for which the dividend has been paid

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INDIAN INCOME TAX (PROVIDENT FUNDS RELIEF) (CENTRAL BOARD OF REVENUE) RULES

NOTIFICATION

INCOME-TAX

New Delhi the 15th March 1930

No 12—In exercise of the powers conferred by Chapter IX A and by section 59 of the Indian Income tax Act 1922 (XI of 1922) the Central Board of Revenue is pleased to make the following rules the same having been previously published as required by sub section (1) of section 58 L read with sub section (4) of section 59 of the said Act —

1 *These rules may be called the Indian Income tax (Provident* Funds Relief) (Central Board of Revenue) Rules

2 In these rules section means a section of the Indian Income tax Act 1922 (XI of 1922)

3 An order according recognition to a provident fund shall take effect—

(*a*) in cases where the application for recognition has been received by the Commissioner of Income tax before the 31st May 1930 — on 31st March 1930

(*b*) in other cases on the last day of the month in which the order is made or at the request of the employer on the last day of any later month in the same financial year

4 An appeal under sub section (5) of section 58 B shall be in the following form and shall be verified in the manner indicated therein —

Form of appeal against non recognition of a Provident Fund by a Commissioner of Income tax

To The Central Board of Revenue
The petition of employer(s)
carrying on business, profession or at

Your petitioner(s) applied to the Commissioner of Income tax under section 58 B, of the Indian Income tax Act, 1922, for the recognition of the provident fund maintained by them (him) for the benefit of their (his) employees The Commissioner of Income tax has refused recognition for the reasons stated in his order dated of which a copy is attached

For the reasons set out below your petitioner(s) submit(s) that the fund should be recognised, and pray (s) hat the Central Board of Revenue may be pleased to accord recognition

Grounds of appeal

$\frac{We}{I}$ the petitioner(s) named in the above petition do declare that what is stated therein is true to the best of $\frac{our}{my}$ information and belief

Signature
Address of Appellant

Date

5 The accounts of a recognised provident fund shall be prepared at intervals of not more than twelve months

6 An account shall be maintained for each subscriber to the fund in the following form —

Name.... . .. .

Date of joining Fund

Account closed
Date
Paid to employee
Lapsed to employer *or to fund*
Recovery by employer

		Contributions and *Interest*								Exempt		Not exempt			
Year and Month	Salary	Contributions by employee	Interest on sums in column 3	Regular contributions by employer	Interest on sums in column 5	Employer's contributions of a contingent nature (including forfeitures of ex employee's contributions lapsing to the benefit of other *employees*)	Interest on sums in column 7	Total contributions Columns 3 5 and 7	Total interest Columns 4 6 and 8	Contributions not exceeding 1 6th of salary for the year	Interest on sums in column 11 at ....p c p a	Contributions Col 9 minus Column 11	Interest Column 10 minus Column 12	Additions to total income (5, 7 & 10)	Remarks
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
BALANCE B F April May .... March .															
Adjustment on account of temporary withdrawals account (Columns 11 and 12 only) *Adjustment on* account of non repayable withdrawals account (Columns 11, 12, 13 and 14)	Total .														
	Total carried over	3 and 4		5 and 6		7 and 8.				11 and 12					

N. B —The totals of Columns 3 & 4, 5 & 6, 7 & 8 & 1 & 112 will be carried into the next year as the opening balance of Columns 3, 5, 7 & 11, *respectively*

NON REPAYABLE WITHDRAWALS ACCOUNT

	Amount	
April		
May		
June		
July		
March		
Total		

TEMPORARY WITHDRAWALS ACCOUNT

	Advance	Repayment	Interest
Balance brought forward—			
April			
May			
June			
July			
March			
		Balance carried over	

7 An abstract for the financial year or other applicable accounting period of the individual account of each employee participating in a recognised provident fund shall be furnished by the trustees to the Income tax Officer of he area in which the employer conducts his business profession or vocation or to such other Income tax Officer as the Commissioner may in each case direct not later than the fifteenth day of June in each year It shall be in the form prescribed in rule 6 but shall show only the totals of the various columns thereof for the financial year or other accounting period It shall also give an account of any temporary withdrawals by the employee during the year and of the repayment thereof

8 The account to be made under the provisions of sub section (1) of section 58 J shall show in respect of each employee (i) the total salary paid to the employee during the period of his participation in the provident fund (ii) the total contributions (iii) the total interest which has accrued thereon and (iv) so far as may be the percentage of the employee s salary in accordance with which contributions have been made by the employer and employee

INDIAN INCOME TAX (PROVIDENT FUNDS RELIEF) RULES FINANCE DEPARTMENT (CENTRAL REVENUES)

NOTIFICATION

INCOME TAX

New Delhi the 15th March 1930

No 9—In exercise of the powers conferred by Chapter IX A of the Indian Income tax Act 1922 (XI of 1922) the Governor General in Council is pleased to make the following rules the same having been previously published as required by sub section (1) of section 58 L read with sub section (4) of section 59 of the said Act —

1 These rules may be called the Indian Income tax (Provident Funds Relief) Rules

2 In these rules section" means a section of the Indian Income tax Act 1922 (XI of 1922)

3 The contributions made by employees after the date of recognition of a provident fund and the interest on the accumulated balances of such contributions shall be wholly invested in securities of the nature specified in clause (a) (b) (c) (d) or (e) of section 20 of the Indian Trusts Act 1882 and payable both in respect of capital and of interest in British India

4 (1) Withdrawals by employees shall not be allowed by the trustees except on special grounds in the following circumstances or circumstances of a similar nature—

(a) to pay expenses incurred in connection with the illness of a subscriber or a member of his family

(b) to pay for the passage over the sea of a subscriber or any member of his family,

(c) to pay expenses in connection with marriages funerals or ceremonies which by the religion of the subscriber it is incumbent upon him to perform and in connection with which it is obligatory that expenditure should be incurred,

(d) to meet the expenditure on building or purchasing a house or a site for a house provided that such house or site is assigned to the trustees of the fund,

(e) to pay premia on policies of insurance on the life of the subscriber or of his wife provided that the policy is assigned to the trustees of the fund and that the receipts granted by the insurance company for the premia are from time to time handed over to the trustees for inspection by the Income tax Officer

(2) For the purposes of sub rule (1) Family means any of the following persons who reside with and are wholly dependent on the employee namely —the employee s wife legitimate children step children parents sisters and minor brothers

(3) No such withdrawal shall exceed (1) the pay of the employee for three months or in the case of a withdrawal for the purpose specified in clause (d) of sub rule (1) six months at the time when the advance is granted or (2) the total of the accumulation of exempted contributions and exempted interest contained in the balance to the credit of the employee whichever is less

(4) A second withdrawal shall not be permitted until the sum first withdrawn has been fully repaid

5 (1) Where a withdrawal is allowed for a purpose specified in clause (d) or clause (e) of sub rule (1) of rule 4 the amount withdrawn need not be repaid

(2) Where a withdrawal is allowed for any other purpose the amount withdrawn shall be repaid in not more than twenty four equal monthly instalments and shall bear interest in accordance with rule 6 and no further withdrawal shall be permitted until repayment has been effected in full

6 In respect of withdrawals which are repaid in not more than 12 monthly instalments an additional instalment of 4 per cent of the amount withdrawn shall be paid on account of interest and in respect of withdrawals which are repaid in more than 12 monthly instalments two such instalments of 4 per cent of the amount withdrawn shall be paid on account of interest

Provided however that at the discretion of the Trustees of the Fund interest may be recovered on the amount withdrawn or the balance thereof outstanding from time to time at 1 per cent above the rate which is payable for the time being on the balance in the fund at the credit of the member

7 The employer shall deduct such instalments from the employee's salary and pay them to the Trustees The deductions shall commence from the second monthly payment made after the withdrawal or in the case of an employee on leave without pay from the second monthly payment made after his return to duty

8 In case of default of repayment of instalments under rule 6 and 7 the Commissioner of Income tax may at his discretion order that the amount of the withdrawal or the amount outstanding shall be added to the total income of the employee for the year in which the default occurs and the Income tax Officer shall assess the employee accordingly

9 Notwithstanding anything contained in Rules 4 to 8 it shall be open to the trustees of a recognised provident fund to permit the withdrawal of ninety per cent of the amount standing at the credit of an employee if the employee takes leave preparatory to retirement provided that if he rejoins duty on the expiry of his leave he shall refund the amount drawn together with interest at the rate allowed by the fund

9 A Where the accounts of a recognized provident fund are kept outside British India certified copies of the accounts shall be supplied not later than the 15th June in each year to a local representative of the employer in British India

Provided that the Income tax Officer may in any year appoint a date later than the 15th June as the date by which the certified copies shall be supplied

10 (1) An application for recognition shall be made by the employer maintaining the fund for which recognition is sought and shall be accompanied by the following documents—

(a) the trust deed if any in original with one copy thereof the latter to be retained by the Commissioner and

(b) the rules of the fund

Provided that if the original of the trust deed cannot conveniently be produced it shall be open to the Commissioner of Income tax to accept in lieu of the original a copy certified either by a Magistrate or in any manner specified in rule 7 of the Indian Companies Rules 1914 in which case an additional copy shall be furnished for retention by the Commissioner

(2) The application shall be submitted through the Income tax Officer of the area in which the accounts of the funds are kept or if the accounts are kept outside India through the Income tax Officer of the area in which the local head quarters of the employer are situate

(3) The application shall contain the following information —

(a) Name of employer and address his business profession etc also his principal place of business

(b) Number of employees subscribing to the fund—

(i) in British India

(ii) in Indian States

(iii) outside India

(c) Place where the accounts of the fund are or will be maintained

(d) If the fund is already in existence—

(i) a copy of the last balance sheet of the fund where such is maintained

(ii) details of investments of the fund

(4) A verification in the following form shall be annexed to the application

Form of Verification

$\frac{We}{I}$ the trustee(s) of the above named fund do declare that what is stated in the above application is true to the best of our information and belief and that the documents sent herewith are the originals or true copies thereof

11 Where an employee of a company owns shares in the company with a voting power exceeding ten per cent of the whole of such power the sum of the exempted contributions of the employee and employer to the recognised provident fund maintained by the company shall not exceed Rs 250 in any month

12 If an employee assigns or creates a charge upon his beneficial interest in a recognised provident fund the Income tax Officer shall on the fact of the assignment or charge coming to his knowledge give notice to the employee that if he does not secure the cancellation of the assignment or charge within two months of the date of receipt of the notice the consideration received for such assignment or charge shall be deemed to be income received by him in the year in which the fact became known to the Income tax Officer and shall be assessed accordingly

13 If the Commissioner withdraws recognition from a recognised provident fund the balance to the credit of each employee at the end of the financial year prior to the date of the withdrawal of recognition shall be paid to him free of income tax and super tax at the time when such employee receives the accumulated balance due to him The remainder of the accumulated balance due to him shall be liable to income tax and super tax as if the fund had never been recognised

14 Before withdrawing recognition the Commissioner of Income tax shall give an opportunity to the employer and the trustees of the fund to show cause why recognition should not be withdrawn

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GOVERNMENT TRADING TAXATION ACT

(ACT NO III OF 1926)

An Act to determine the liability of certain Governments to taxation in British India in respect of trading operations

WHEREAS it is expedient to determine the liability to taxation for the time being in force in British India of the Government of any part of His Majesty's Dominions, exclusive of British India, in respect of any trade or business carried on by or on behalf of such Government, it is hereby enacted as follows —

Short title and commencement

1 (1) This Act may be called THE GOVERNMENT TRADING TAXATION ACT, 1926

(2) It shall come into force on such date as the Governor General in Council may, by notification in the *Gazette of India*, appoint [1]

Liability of certain Governments to taxation in respect of trading operations

2 (1) Where a trade or business of any kind is carried on by or on behalf of the Government of any part of His Majesty's Dominions, exclusive of British India, that Government shall, in respect of the trade or business and of all operations connected therewith, all property occupied in British India, and all goods owned in British India for the purposes thereof, and all income arising in connection therewith be liable—

(*a*) to taxation under the Indian Income tax Act, 1922,[2] in the same manner and to the same extent as in the like case a company would be liable

(*b*) to all other taxation for the time being in force in British India in the same manner as in the like case any other person would be liable

(2) For the purposes of the levy and collection of income tax under the Indian Income tax Act, 1922, in accordance with the provisions of sub section (1), any Government to which that sub section applies shall be deemed to be a company within the meaning of that Act, and the provisions of that Act shall apply accordingly

(3) In this section the expression "His Majesty's Dominions" includes any territory which is under His Majesty's protection or in respect of which a mandate is being exercised by the Government of any part of His Majesty's Dominions

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(1) The Act came into force with effect from the 1st April 1926—*Vide* Notification No 13, dated 30th March 1926

(2) XI of 1922

THE
INDIAN INCOME-TAX ACT (XI OF 1922)

An Act to consolidate and amend the law relating to Income tax and Super tax

WHEREAS it is expedient to consolidate and amend the law relating to Income-tax and Super-tax, it is hereby enacted as follows —

Short title extent and commencement

1. (1) This Act may be called THE INDIAN INCOME-TAX ACT, 1922

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, and applies also, within the dominions of Princes and Chiefs in India in alliance with His Majesty, to British subjects in those dominions who are in the service of the Government of India or of a local authority established in the exercise of the powers of the Governor-General in Council in that behalf and to all other servants of His Majesty in those dominions

(3) It shall come into force on the first day of April 1922

Preamble—

As regards the construction of titles preamble etc, *see* Rules of Construction in the Introduction The present Act consolidates the previous Income tax and Super tax Acts and amends them in the light of experience The amendments were largely based on the recommendations of the All India Income tax Committee of 1921 a copy of whose report is printed as an Appendix The Amendments and Repeals are set out on pages 61 and 62 There have been fifteen Amending Acts since 1922

British India—

Under section 3 (7) of the General Clauses Act (X of 1897), British India means ' all territories and places within

Her Majesty's dominions which are for the time being governed by Her Majesty through the Governor General of India or through any Governor or other officer subordinate to the Governor General of India "

India—

Under section 3 (27) *ibid* 'India' means 'British India together with any territories of any Native Prince or Chief under the suzerainty of Her Majesty exercised through the Governor-General of India through any Governor or other Officer subordinate to the Governor General of India'

Local authority—

Under section 3 (28) *ibid* 'Local authority' means 'a Municipal Committee, District Board, body of Port Commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund'

Scope of Act—

The Act applies *territorially* to the whole of British India and only *personally* to the specified class of persons outside British India but within India The *personal* and *territorial* jurisdiction of the Indian legislature is determined by section 65 of the Government of India Act

Sub section (2) governs the whole Act The jurisdiction of the Act cannot extend beyond the areas mentioned herein The jurisdiction however has primary reference to the liability to tax, and if there is liability, the Act gives jurisdiction to give effect to the objects of the Act The liability does not depend on the effectiveness of the machinery to enforce liability [1] Thus there is nothing to prevent an Income tax Officer acting under section 64 (4) assessing an assessee residing out of India Whether he can enforce the assessment is a different matter which would depend on what property the assessee had in India, etc

The jurisdiction of the Indian Legislature is regulated under section 65, Government of India Act, which runs as below —

" The Indian Legislature has power to make laws —

(a) For all persons for all courts and for all places and things within British India, and

(b) For all subjects of His Majesty and servants of the Crown within other parts of India and

(c) For all native Indian subjects of His Majesty, without and beyond as well as within British India, and

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(1) *Crane v Commissioners of Inland Revenue* 7 Tax Cases 316, *Whitney v Commissioners of Inland Revenue*, 10 Tax Cases 88

(*d*) For the government officers soldiers (airmen) and followers in *His Majesty's Indian forces* wherever they are serving in so far as they are not subject to the Army Act (or the Air Force Act) and

(*e*) For all persons employed or serving in or belonging to the Royal Indian Marine Service, and "

'Income, profits and gains' arising or accruing or received in British India or deemed to so accrue, etc are included in 'things' in clause (*a*) above otherwise no non resident could be made liable to tax—even through an agent—unless the non resident fell under one of the clauses (*c*), (*d*) or (*e*)

Section 7 (2) applies only to the particular class of income mentioned therein, namely, 'salaries', and sets out the extent to which income not accruing, arising, or received in British India may be *deemed* to be chargeable within the meaning of section 4 Section 1 governs section 7 (2) also, and the latter, it will be seen, does not—as indeed it cannot—go beyond the scope of section 1, which in its turn is really determined by section 65 of the Government of India Act

See also notes under sections 22 (serving notices on non-residents), 29 (issuing notice of demand), 64 (4) (Jurisdiction of the Income tax Officer), and 65 (indemnity)

History—

The words "and to all other servants of His Majesty in those dominions' were added in 1918 Formerly only British subjects serving outside British India were liable Now even subjects of Indian States who are in the service of the Government of India but serve outside British India and within India are liable The fact that these persons pay Income tax to the Government of India *does not absolve them from liability* to taxation by the States which have powers to tax them—*see* however notes under section 60 regarding relief from Double Income tax

The words "Sonthal Perganas' were added in 1916 Previously the Act had been extended by the Sonthal Perganas Settlement Regulations (III of 1872) and (III of 1899)

The words including British Baluchistan were added in 1922 Formerly, the Act was applied by notification only to salaries and pensions paid by Government or local authorities The conditions after the war justified the extension of the whole Act to British Baluchistan Besides, traders and contractors from other Provinces made substantial profits in this Province

and brought it to India without paying Income tax—*see* the case of *Rai Bahadur Sundar Das*[2] cited under section 4

The whole of the Act has been applied to Berar, the Civil and Military Station of Bangalore, and the districts of Abu and Angul The Act applies only to salaries and pensions paid by Government and local authorities in the cantonment of Baroda, the British Administered areas in Central India and the British Administered areas (excluding Railway land) in Bombay Presidency

Administered areas—Income arising, etc, in—Double taxation of

Where the Act has been extended to territories which are not British India, strictly speaking profits accruing or arising or received in British India or deemed to accrue or arise or to be received in British India are liable to tax even if they have already been taxed in those territories, except, of course, in those cases in which the doctrine of "no second receipt in the hands of the same person" [*see* notes under section 4 (2)] saves such income from double taxation The point is that these territories are, so to speak, duplicates of British India and not part of British India In practice, however, by executive orders, the following concessions have been given, saving such income from double taxation Berar is practically treated as part of British India for purposes of assessment and no question of double taxation arises When the same profits are taxed both in British India and in the Civil and Military Station of Bangalore, a deduction or refund is given in British India equal to the tax levied on such profits in the Civil and Military Station if the headquarters of the firm or company, etc, are in British India, and a similar refund or deduction is given at Bangalore if the headquarters of the firm or company are at Bangalore

Salaries of persons outside India—

The position resulting from this section and section 7 (2) is that the salaries of Government officers serving outside *India* (*i e*, accruing or arising out of India, *e g*, in the Persian Gulf) are not taxable unless *received* in India

Salaries in Indian States—

In Indian States, all persons in the service of Government, of whatever nationality, are liable to tax, but only those servants of local authorities who are British subjects are taxable If a Government servant is lent to a "local authority" in an Indian State, he will be taxable whether he is a British Subject or not

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(2) I L T C 189

because he does not cease to be a servant of His Majesty owing to his being lent to a "local authority", but a Government servant lent to an Indian State for service in that State is not taxable as he ceases to be a servant of His Majesty—*see* section 7 (2) Other British subjects in Indian States are not taxable

Frontier Agency Tracts and Ceded Areas are included in the term "Dominions of Princes and Chiefs in India in alliance with His Majesty"

United Kingdom Law—

The English Income tax Acts do not contain any provisions similar to this section The scope of the Acts there is defined by the various charging sections and the interpretations placed on them by the Courts See the remarks of Lord Herschell in *Colquhoun v Brooks*,[3] quoted in the Introduction *See* also *Whitney v Commissioners of Inland Revenue*,[4] cited under section 22 as regards the taxation of non residents and the remarks of Tomlin, J regarding the scope of the Australian Income tax laws in *London & South American Investment Trust v British Tobacco Co Ltd*[5]

Definitions

2 In this Act, unless there is anything repugnant in the subject or context,—

'Unless there is anything repugnant in the subject or context'—Examples of words not used in the strict sense of the definitions in this section are "assessee" in sections 24 and 64

The definitions should be followed in construing not only the Act proper but also the Rules and Notifications These definitions are supplementary to those in the General Clauses Act except where they definitely override them

(1) "agricultural income means—

(*a*) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such,

(*b*) any income derived from such land by—

(*i*) agriculture, or

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(3) 2 Tax Cases 490
(4) (1926) A C 37 10 Tax Cases 88
(5) 42 T L R 771, (1927) 1 Ch 107

(*ii*) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or

(*iii*) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-clause (*ii*),

(*c*) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land or occupied by the cultivator, or the receiver of rent-in-kind of any land with respect to which, or the produce of which, any operation mentioned in sub-clauses (*ii*) and (*iii*) of clause (*b*) is carried on

Provided that the building is on or in the immediate vicinity of the land and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent-in-kind by reason of his connection with the land requires as a dwelling house or as a store-house or other out-building

History—

In the Income tax Act of 1860 agricultural income was taxed This was given up in 1865 In the Act of 1867 the tax was levied only as a license tax on professions and trades, and agriculture was neither a 'profession' nor a 'trade' In 1869, an income tax was levied upon all incomes including agricultural income, and in 1873 74 this was given up In 1877 a license tax was levied upon traders and artisans but not upon agriculturists on whom a cess on land was levied In 1886 a regular Income tax Act was passed but exempting agricultural income and the exemption is still in force The principal reason for exempting agricultural income from 1877 onwards appears to have been not the fact that landlords paid revenue to Government (which of course was in return for the use of land) but that they paid a cess on land corresponding to income tax This cess was not inconsiderable having regard to the low rates of income tax then prevalent, and it was considered that landlords should

not be asked to contribute to the general exchequer more than once (apart from the payment of land revenue which, as already stated, was held to be not a contribution to the public revenues but a payment for the use of land) In those days when the Cess Acts were passed and an income tax levied on agricultural income the owners of permanently settled estates carried on a powerful agitation against these imposts on the ground that the new taxes constituted a breach of the Permanent Settlement As will be seen the policy of the Government of India was vacillating They met these complaints, not by exempting permanently settled estates as such from income tax, but by exempting all agricultural income whether the lands were permanently settled or not The omission of the 1886 Act to refer expressly to permanently settled estates has as will be seen from the Introduction, led to considerable difference of opinion about the liability to income tax of non agricultural income from permanently settled estates

Circumstances have, of course, since changed especially since 1916 17 with the introduction of a graduated system of income tax and the levy of super tax—*see* for instance para 60 of Sir William Meyer's Budget speech for 1917 18 In 1918 when the Income tax Act was amended and consolidated Government intended to take into account agricultural income for the purpose of fixing the *rate* at which an assessee should pay tax—a clearly logical step with the advent of a real system of graduation—but this was opposed by the Legislative Council and the proposal was dropped In 1922, when the Act was again revised, Government desired to exclude 'forestry' from agricultural income but this also was opposed by the Assembly and the proposal was dropped Agricultural income as now defined in the Act, is not only exempt from income tax but must not even be taken into account in considering the 'rate' at which the assessee should be taxed on his non agricultural income Nor can it be taken into account even for super tax, however large the income The existence of agricultural income is completely ignored by the Income tax Officer for all purposes Government, however, have never given a specific undertaking that they will not tax agricultural income in future nor can there be any doubt that the Legislature has powers to tax agricultural income as well as income from permanently settled estates Recent political developments are bringing the question to the forefront, and the Taxation Enquiry Committee (1926) wrote on the subject at length in their report

Under the previous Acts profits from the sale by a cultivator or receiver of rent in kind of the produce raised or received by him were included under "agricultural income" only if

he did not keep a shop or stall for the sale of such produce Under the present Act such profits are exempt from taxation if the produce is sold in a raw state or after it is subjected only to such processes as an ordinary cultivator would employ The present Act, it will be seen, makes the law more lenient The change was made in 1922

The drafting of the corresponding portion of the previous Acts was also defective The words 'in British India' in clause (*a*) and 'such land by' in clause (*b*) did not occur there in The result, therefore, was that the income from lands outside British India, *e g*, in Indian States—whether falling under clause (*a*)—any rent or revenue or (*b*)—income derived from cultivation, etc, or (*c*)—from occupied buildings—escaped taxation This defect has been remedied in the present Act under which only income from such land as is either assessed to land revenue *in British India* or subject to a local rate assessed and collected *by officers of Government as such* is exempt from income tax

Conditions to be satisfied by the land—

The definition imposes the following conditions The land must first of all be used for an agricultural purpose As to what constitutes such purpose, *see* below The land should also be (1) either assessed to land revenue in British India or (2) subject to a local rate assessed and collected by officers of Government as such In practice there is hardly any land which is not assessed to land revenue or local rates, *i e*, which escapes both Even waste lands which are settled are assessed to revenue though up to a certain stage the revenue is remitted Lands like those of *Col Malik Sir Umar Hayat Khan* in Shahpur District, Punjab (cited *infra*) are very rare All that the law requires is, that land revenue should be assessed and not that it should be actually levied and collected, though there is not much practical significance in this distinction

Local rates—

The Act does not define 'local rates' and there is no general definition in other statutes in India There are definitions in English statutes but they are clearly inapplicable to India A 'rate' as distinguished from a 'tax' is sometimes used to denote a payment for services rendered, but such a distinction is not relevant to the present context The expression 'local rates' presumably means taxes for the benefit of local authorities, *i e*, District Boards, Municipalities, etc, but there is no authority to justify one's defining 'local rates' as meaning rates on account of 'local authorities' as defined in the General Clauses Act It

was argued in the case of *Malik Umar Hayat Khan*[6] that, if a land is *not assessed to land revenue* but pays irrigation rates to Government, 'local rates' should be construed to include such irrigation rates as well, but the Court did not give a ruling on this point as they threw out the case on different grounds

A further condition is that such local rates should be assessed and collected by officers of Government as such A tax, therefore, levied by a municipality which is assessed and collected by its own officers, would not come within the definition Such land could not escape income tax unless it was assessed to Land Revenue On the other hand Road and Educational cesses and cesses for District Boards and District Committees are almost invariably assessed and collected by officers of Government

What constitutes Agriculture?—

There is no definition in the Act of the term 'agriculture,' nor is a simple definition of such a common and comprehensive word possible The word should, therefore, be interpreted with reference to common usage as well as the general spirit and the tenour of the Act A provision exempting certain specified items from taxation should, like all remedial legislation, be construed in as liberal a spirit as possible The ordinary dictionary meanings of agriculture are as below —

"Farming horticulture forestry butter and cheese making etc " (Webster)

' The tillage of the land the art of cultivating the soil including the allied pursuits of gathering of the crops and rearing live stock also husbandry—farming in the widest sense ' (Murray's Oxford Dictionary)

There are various definitions of the word in enactments of the United Kingdom as well as in Indian enactments, *e g*, Rent Recovery Acts, Estates Tenancy Acts, Agriculturists' Relief Acts, but these enactments are not *in pari materia* with the Indian Income tax Act In the Agricultural Rates Act (59 and 60 Vict, cap 16) passed in 1896 for the purpose of exempting the occupiers of agricultural lands in England from paying as high rates on such lands as those levied on buildings and other hereditaments 'agricultural land' is defined in section 9 as follows —

The expression 'agricultural land ' means any land used as arable meadow or pasture ground only cottage gardens exceeding one quarter of an acre market gardens nursery grounds orchards or allotments but does not include land occupied together with a house as a park gardens other than as aforesaid pleasure grounds or any land kept or preserved mainly or exclusively for purpose of sport or recreation or land used as a race course

(6) 2 I T C 52

The definitions and rulings in the United Kingdom Income tax Acts are not of much help because the scheme of taxation of agricultural income is different in the two countries In India such income is exempt from taxation whereas in the United Kingdom it is liable to taxation though under a particular schedule instead of another—with certain incidental differences in favour of agricultural income

In a case under the United Kingdom Excess Profits Duty Acts *Inland Revenue* v *Ransom*,[7] Sankey, J said

"The contention for the Crown is that 'husbandry' means farming 'husbandry' is a term of very wide signification and though I am not prepared to hold that a man who tills and cultivates the soil is in all circumstances a husbandman or a man engaged in 'husbandry' I can see no distinction between a man who does so in order to produce food for human consumption and a man who does so in order to produce medicines and herbs also for human consumption"

In *Duncan Keir* v *Thomas Gillespie*[8] it was held that the term "husbandry" was not restricted to tillage or cultivation of the soil but included the use of lands for the purpose of grazing sheep

Per the Lord President—Confessedly no light is thrown by the Statutes on the meaning of the word "husbandry" It has no technical or secondary meaning It must be taken in its ordinary acceptation What is that? Is it confined to tillage or cultivation or does it embrace "all farming operations' For the answer I rather think we must turn to the dictionary and having regard to the object and the purpose of the statutes we are construing take the widest meaning which is there first put upon the expression (In) Stormonth's Dictionary I find 'husbandry' defined first as "the business of a farmer" and "husbandman" as the "man who manages the concerns of the soil" According to the New English Dictionary 'husbandry' signifies "the business or occupation of a husbandman or farmer including also the raising of live stock and poultry" In Murray's Dictionary a like meaning is given to the term The attempt to confine 'husbandry' to the 'tillage' of the soil fails For 'tillage' is defined as "the act or practice of preparing land for seed and raising crops" To adopt it would be to confine husbandry to the raising of crops which are artificial and not natural 'Husbandry' has in these days come to have a much more extended meaning than that but even if turning over the soil to enable a crop to be grown were essential we have it in the cutting of the drains on the sheep farm 'Husbandry' as Mr Justice Kenny said *In re the Cavan Co operative Society*[9] 'presupposes a connection with land and production of crops or food in some shape" but let me add it shall not pre suppose the use of

(7) (1918) 2 K B 709 12 Tax Cases 21

(8) 7 Tax Cases 473

(9) (1917) 2 I R 608

artificial means to prepare the land for raising the crops Neither judicial decision nor statutory enactment nor practice throws any light upon it All that one can say about it is that in common parlance lands devoted to grazing sheep are occupied "for the purposes of husbandry" and that a sheep farmer is in the ordinary acceptation of the term a 'husbandman.'

Per Lord Mackenzie—It may be that in its origin the word 'husbandman' meant the man who ploughed and planted as distinguished from the man who owned flocks and herds No such limited meaning can now be attached to the word

Per Lord Sherrington—I think at the present day the primary and natural meaning of the word 'husbandry' as applied to land includes all those uses of the land which are common to what at the present day we describe as farmers In short the rearing of sheep and cattle and the production of milk are a familiar and daily duty of the husbandman

'Husbandry' is practically the same as 'agriculture' and the interpretation of the English and Scottish Courts could apparently be extended to the Indian Income tax Act

The definitions of "agriculture" in Indian Tenancy Acts are clearly inapplicable to income tax because the subject matter of these Acts is so entirely different from that of the Income tax Act The object of these Acts is to secure certain rights for tenants as against the landlords or rather to limit the powers of the landlords as against the tenants, and the most natural interpretation of such Acts is to construe words strictly, so as not to create new rights as against the landlords Thus in a case under the Madras Estates Lands Act[10] it was decided by the High Court that 'agriculture' does not include pasturage, but it would be obviously improper to apply this interpretation for the purposes of the Income tax Act also Such an application would, apart from offending against all accepted rules of interpretation, be in total conflict with the general purport of the Income tax Act, inasmuch as it would result in inferior pasture lands being subjected to double taxation, *i e*, to the payment both of land revenue and of income tax, while leaving superior lands bearing cereal and other crops to pay only land revenue and nothing else

On the other hand, in a case under the Madras District Municipalities Act,[11] the High Court held that pasture land was agricultural and therefore exempt from enhanced rates

Per Davies and Moore JJ— We have no hesitation in holding that land on which potatoes grain vegetables etc are grown are lands used solely for agricultural purposes We do not consider that any distinction can be drawn between large and small plots of lands on which roots or grain are cultivated

(10) *Rajah of Venkatagiri v Ayyappa Reddi* 38 Mad 738
(11) *Emperor v Alexander Allan*, 25 Mad 627

Turning again to the definition of the word "agricultural" which we have accepted we find that agricultural lands include lands set apart as pasture ground only and also lands used for rearing live stock If therefore it could be shown that these so called waste lands were in reality pasture grounds or lands used for rearing live stock we should certainly decide that they were lands used solely for agricultural purposes

This decision was evidently given on the principle of liberally construing remedial legislation and is of greater applicability to the Income tax Act than a decision under the Estates Lands Act

The primary meaning of 'agriculture is the cultivation of the ground and in its general sense it is the cultivation of the ground for the purpose of procuring vegetables and fruits for the use of man and beast including gardening or horticulture and the raising or feeding of cattle and other stock Its less general and more ordinary signification is the cultivation with the plough and in large areas in order to raise food for man and beast or in other words that species of cultivation which is intended to raise grain and other field crops for man and beast Horticulture which denotes the cultivation of gardens or orchards is a species of agriculture in its primary and more general sense—per Bhashyam Aiyangar J in *Murugesa Chetti v Chinnathambi Goundan*[12] (in which the question was whether a lease was agricultural)

In *Panadai Pathan v Ramasami*[13] in which again the same question was raised, the denotation of the word was made wider

Spencer J—"With due deference while accepting that the case was rightly decided I am unable to follow the opinion of Bhashyam Aiyangar J in *Murugesa Chetti v Chinnathambi Goundan*[12] that the word 'agriculture in its more general sense comprehends the raising of vegetables fruits and other garden products as food for man and beast if the learned Judge intended thereby to limit it to the raising of food products For to so restrict the word would be to exclude flower indigo cotton jute flax tobacco and other such cultivation For the purposes of that particular case which related to a lease of betel gardens considering the policy of favouring agriculture upon finding that they produced a form of food the connection between agriculture and the production of food may have seemed important but such a limitation is not supported by the definition of agriculture in the Oxford Dictionary which is the science and art of cultivating the soil tillage husbandry farming (in the widest sense) ' This dictionary notes that a meaning restricted to tillage is rare In Bouvier s Law Dictionary 'agriculture' is defined as the cultivation of the soil for food products or any other useful or valuable growths of the field or garden

Shepherd J who sat with Bhashyam Aiyangar J conceded that the earlier decision *Kunhayan Haji v Majan*[14] to which he was a party

(12) (1901) I L R 24 Mad 421
(13) 45 M 710
(14) (1894) I L R 17 Mad 98

which decided that the lease of a coffee garden was not an agricultural lease, was wrong

I am equally unable, with respect, to agree with the narrow definition of Sadasiva Ayyar, J, in *Seshayya v Rajah of Pitapur*,[15] and *Rajah of Venkatagiri v Ayyappareddi*,[16] that agriculture means the raising of annual or periodical grain crop through the operation of ploughing sowing etc, though the decision may be perfectly sound so far as they excluded pasture lands from 'ryoti land' for the purpose of the Madras Estates Land Act.

The learned Judge's definition would exclude sugarcane, indigo, tea, flower, tobacco and betel cultivation from agriculture

In my opinion agriculture connotes the raising of useful or valuable products which derive nutriment from the soil with the aid of human skill and labour and thus it will include horticulture, arboriculture and sylviculture in all cases where the growth of trees is effected by the expenditure of human care and attention in such operations as those of ploughing, sowing, planting, pruning, manuring, watering, protecting, etc "

Obviously 'agriculture' is not necessarily confined to the cultivation of cereals While it is *not difficult to raise cases on* the borderland which could be considered to be both agricultural and not agricultural, it is not so easy to exhaust, by enumeration, the possible agricultural uses to which land can be put Obviously they must include dairying, poultrying, rearing of live stock, gathering of wool, etc , but all such uses could be non agricultural as well in certain circumstances Thus dairying with stall fed cattle in urban areas or poultrying in similar areas cannot be agricultural But these instances would also be excluded by the very definition of 'agricultural income' in the Act, which pre supposes that the income is derived from *land assessed to Land Revenue*, etc The profits of a milk seller who merely purchases from cattle owners and sells the milk, etc , to others are presumably profits from trade as they cannot be brought under any of the clauses in the definitions of 'agricultural income '

A co operative society buying milk from its members and selling the butter in the open market, returning the skimmed milk to its members, does not carry on 'husbandry', though the making of butter by an ordinary farmer on his farm would be 'husbandry'[17]

Rule 4 of Case III of Schedule D in the United Kingdom Income tax Act provides for cases of milk and cattle dealers who are charged supplementarily to the charge under Schedule B in

(15) (1916) 3 L W 485
(16) (1915) I L R 38 Mad 738
(17) *Commissioners of Inland Revenue v Cavan Central Co operative Society*, 12 Tax Cases 1, (1917) 2 I R 594 and 622

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Obviously 'agriculture' is not necessarily confined to the cultivation of cereals While it is not difficult to raise cases on the borderland which could be considered to be both agricultural and not agricultural, it is not so easy to exhaust, by enumeration, the possible agricultural uses to which land can be put Obviously they must include dairying, poultrying, rearing of live stock, gathering of wool, etc, but all such uses could be non agricultural as well in certain circumstances Thus dairying with stall fed cattle in urban areas or poultrying in similar areas cannot be agricultural But these instances would also be excluded by the very definition of 'agricultural income in the Act, which pre supposes that the income is derived from *land assessed to Land Revenue*, etc The profits of a milk seller who merely purchases from cattle owners and sells the milk, etc, to others are presumably profits from trade as they cannot be brought under any of the clauses in the definitions of 'agricultural income'

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(16) (1915) I L R 38 Mad 738

(17) *Commissioners of Inland Revenue v Cavan Central Co operative S* 12 Tax Cases 1, (1917) 2 I R 594 and 632

certain cases These conditions give a clue as to when in such cases agricultural becomes "trade" i e, ceases to be agricultural The conditions are (1) the man must be a dealer in cattle or a dealer in or a seller of milk, (2) the lands must be insufficient for the keep of the cattle brought on to the lands, and (3) the lands must be so insufficient that the assessable value of the lands affords no just estimate of the profits Condition (3) cannot be applied by analogy in India in face of the definition of agricultural income, but conditions (1) and (2) seem to be applicable

It is fairly clear that income from fisheries,[18 & 20] markets,[18] moorings,[18] ferries,[18] stone quarries,[19] coal, manganese, mica, etc, is not agricultural The profits from a mela (fair) held on land admittedly agricultural are not agricultural income[21] So also the income from the use of land for storing purchased food crops etc[21a] Profits from trade in milk are as already stated not 'agricultural income' Profits from sea fisheries, including pearl and 'chank', and fisheries in public ponds, lakes, etc, are not entitled to the exemption at all (even assuming that by any possible straining of words they could be considered 'agricultural') because the 'land' is not assessed to land revenue in British India

The income derived from honey, whether the deposit is spontaneous or derived from the rearing of bees, is undoubtedly agricultural, and if the land is assessed to land revenue or a local rate, exempt from income tax

Grazing Lands—Leased—

The position of income derived from land leased out and used for grazing cattle of other persons than the lessee is not clear In the United Kingdom it has been decided that such profits constitute profits of 'trade' and not income from 'husbandry'[22]

In *Donald* v *Thompson*,[23] the assessee rented certain grass parks outside his farm and utilized them for the grazing of young dairy cattle with which to replenish his farm stock It was held that the profits from the seasonal occupation of the grazings outside the farm were assessable to income tax under Schedule D, i e, as profits from business, and not as agricultural income The assessee had been assessed in the usual course under Sche-

(18) *Maharajadhiraj of Darbhanga* v *Commissioner of Income tax*, 1 I T C 302 and 410, see also *Probhat Chandra Barua's Case* 51 Cal 504

(19) *Shiblal Gangaram* v *Commissioner of Income tax*, 50 All 98

(20) *Emperor* v *Raja P C Barua*, 1 I T C, 284

(21) *Umed Rasul* v *Anath Bandu*, 28 Cal 637

(21a) *Probhat Chandra Barua's Case*, 2 I T C 392

(22) *McKenna* v *Herlihy*, 7 Tax Cases 620

(23) 8 Tax Cases 277.

dule B, i e, occupation of agricultural land

Land—Leased or mortgaged—

The land need not be cultivated by the owner himself It can be leased, in which case the income would still be income from agriculture both to the lessor and to the lessee If the land is mortgaged, the income will be agricultural income in the hands of the mortgagee if it is a usufructuary mortgage but not if it is a simple mortgage It has been suggested however by the Patna High Court[24] that even in a genuine usufructuary mortgage it is arguable that the source of income is not the land and that income from a mortgage even if usufructuary is in essence of the nature of interest The question however has not been finally decided In the case of a simple mortgage of course, the owner would receive the agricultural income himself while the mortgagee would be merely in receipt of income from money lending, which would not be differentiated in any way merely because he had a right to attach the property in case the debt was not paid Where there are intermediary lessees or tenure holders—whatever the nature of interest and whatever the local tenure, zamindary or ryotwari or anything else—the income of all these holders and lessees is clearly agricultural

Usufructuary mortgages—

In *Commissioner of Income tax v Subramania Sastrigal*,[25] the Madras High Court held that when a person carrying on money-lending business lends money in the course of such business on the security of lands of which he takes usufructuary mortgage and immediately leases these lands back to the borrowers, the rent of the lands being a definite percentage of the loans given, such rent is not agricultural income The Allahabad High Court in the cases of *Mukand Sarup*[25a] *and Banwarilal*[26] questioned this view The scheme of the Act does not distinguish between agricultural income on the one hand and business income on the other, and even if the income was admittedly from business there was nothing to prevent that part of the income which was derived from agriculture being exempt under section 4 (3) (*viii*) The court considered therefore that unless the mortgage was a sham (the consequences of such a mortgage they did not examine) the income was clearly agricultural In a later case[27] the Madras High Court also have receded fom the view

(24) *Rajniti Prasad Singh v Commissioner of Income tax*
(25) 2 I T C 152
(25a) 2 I T C 496
(26) Unreported
(27) *Ibrahim, etc, Routher v Commissioner of Income tax*, 3 I T C 33

originally taken by them, and adopted the line of reasoning adopted by the Allahabad High Court and their conclusion

Without deciding the general question whether income from genuine usufructuary mortgage, is exempt or not, the Patna High Court decided in *Rajniti Prasad Singh* v *Commissioner of Income-tax*,[27a] that when a usufructuary mortgage and a lease back are executed simultaneously and reciprocal references are made in the two documents, they should be construed together as parts of one and the same transaction In the particular case, it was obvious from the two documents read together, that the intention of the parties was that the mortgagee was not to enter into possession nor really to enjoy the usufruct The Madras case of *Ibrahim Routher* was distinguished on the ground that in that case there was no mention in the mortgage deed of any rate of interest whereas in *Rajniti's* case there was The soundness of the Allahabad ruling was also questioned

In a case in which though a mortgage purported to be with possession, the mortgagee was in fact entitled only to a fixed sum every year from the lessee (the land having been already under lease) in consideration of the money lent, and had otherwise no concern with the produce of the land or possession thereof, it was held that the mortgage was in fact a simple mortgage, and that the fixed sum received from the lessee was not income from the land[28]

Toddy—

Income received from toddy is agricultural when it is received by the actual cultivator, whether owner or lessee, of the land on which the trees grow. If the income is obtained by a person who has not produced the trees from which the toddy is tapped or has not done any agricultural operation whereby the trees have been raised, it is not agricultural income within the meaning of the Act[29] The *ratio decidendi* was that there can be no lease of trees apart from the land, and in this case the assessee admitted that he had no interest in the land

Forest produce—

In the Bill of 1922 it was proposed to tax income from forestry but the Select Committee threw out the proposal and the Government acquiesced in the Committee's recommendation It is arguable whether the expression 'agriculture' includes fores-

(27a) 1930 A I R Pat 23

(28) *Muhamad Yakub Khan & Muhamad Aslam Khan v Commissioner of Income tax*, 3 I T C 308

(29) *Commissioner of Income tax v Alagappa Nadar*, 105 I C 489, 2 I T C 470

try Growing and felling timber on one's own land may be considered agriculture, but no amount of straining can make the felling and marketing of timber grown on another man's land agriculture In the *Chief Commissioner of Income tax, Madras* v *The Zemindar of Singampatti*, the Madras High Court appeared to incline to the view that income from forestry was agricultural This was, however, *obiter* and not part of the decision In *Emperor* v *Raja P C Barua*,[31] the Calcutta High Court held that income derived fom payments for stacking timber in forest land is not 'agricultural income' In *Har Prasad* v *Emperor*,[32] the Lahore High Court held that income derived from land let out for the purpose of stacking timber was not agricultural income Para 2 of the Income tax Manual says "it a land owner grows on his own land, which is assessed to land revenue, forests or trees and derives income therefrom, he is not liable to income tax on such income Persons, however, who take contracts in forests for the cutting down of trees and selling of timber are liable to tax on the profits from such transactions" The question whether receipts from felling timber in a forest are of a capital or of a revenue nature is a different one, and in the *Tehri*[32a] case, the Allahabad High Court said that it was a question of fact

Lac, Silk, etc —

The same principles should presumably apply to *lac* cultivation which is semi agricultural Income from *lac* is really a species of income from forestry The owner of a forest assessed to land revenue would not be taxable in respect of income from the cultivation or collection of *lac* on the trees in the forest If the forest is let out to an ordinary agriculturist, neither the owner nor the tenant would be taxable If, on the other hand, the forest is let out to a commercial contractor (as distinguished from a tenant) the owner would not be taxable but the contractor would be If the owner himself or the tenant introduces processes not ordinarily followed by the cultivator, he would clearly be taxable Merchants who buy *lac* and manufacture it into *shellac* etc, are clearly taxable, as such manufacture cannot be considered an agricultural process

The same principles would apply *mutatis mutandis* to sericulture and other similar pursuits

Water—Income from—Whether Agricultural—

In *Malik Umar Hayat Khan and others* v *Commissioner of Income tax*,[33] a case probably *sui generis*, the assessees who

(30) 1 I T C 181 4 Mad 518
(31) 1 I T C 284
(32) 1 I T C 417
(32 a) 1930 A L J 579
(33) 2 I T C 52

owned certain canals purchased water from Government for which they paid irrigation rates and sold it to certain agriculturists who paid for it in kind by a share of the produce It was contended on behalf of the assessee (1) that the income was derived from land—either from the land constituting the water courses or the land of those using the water, the latter giving a share of the produce as rent for the water and (2) that if the income was derived from the land forming the water courses, that land paid 'irrigation' rates which, it was contended, should be included in 'local rates' (the latter not having been defined) and that if the income was held to be derived from the lands of those using the water, the latter was assessed to land revenue, (3) that the land constituting the water courses should be held to be subservient or appurtenant to the lands cultivated with the water purchased and (4) that as the income was dependent upon the crop of the lands cultivated by the purchasers, it should be considered to be income from these lands The Court held that the income was not derived from land at all but simply from the sale of water and that the fact that the price was paid in kind and not in cash made no difference whatever They therefore considered that the income was not 'agricultural income,' and the other points raised by the assessee were therefore not considered

Payments out of Agricultural income—

An annuity payable under a will even though paid out of agricultural income is not such unless the annuity is a rent charge on specific agricultural property [34]

Rent and Revenue—

What the framers of the Act meant by the distinction between 'rent' and 'revenue' is not clear The words have come in the same form from 1886 and from a practical point of view the distinction is not of importance as both are equally entitled to the exemption

'Rent' is defined in section 105 of the Transfer of Property Act as 'money, share of the crops, service, or any other thing of value to be rendered periodically or on specified occasions by the tenant to the landlord in consideration of the enjoyment of immoveable property' The same idea pervades most of the definitions in Indian Tenancy Legislation Rent implies the idea of a lessor and lessee or landlord and tenant Revenue on the other hand is a different concept

The dictionary meaning of 'revenue' is as below

' the return, yield or profit of any lands, property or other important source of income, that which comes to one as a return from

(34) *Zamindarini of Tiruvur v Commissioner of Income tax, Madras* 3 I T C 428

property or possessions specially of an extensive kind, income from any source specially of an extensive kind income from any source but specially when large and not directly earned' —Oxford Dictionary

'Revenue' is ordinarily a word with a wider denotation than 'rent' The distinction however in the mind of the framers of the Act is probably that 'revenue' is income due to the State and 'rent' the income on account of the user of land due to the landlord This is the usual distinction which is observed in many land revenue and agrarian enactments in India The landlord receives 'rent' from his tenants and pays 'revenue' to Government A person other than Government also can receive revenue but in such cases the Government must have relinquished it in his favour A jagirdar, for instance, who receives an assignment of revenue from specified lands—whether in ryotwari or zamindari tracts—is evidently the kind of person contemplated by the Act The Income tax Manual makes it clear that payment of land revenue to a jagirdar is not assessable to income tax in the hands of the jagirdar

Rent or Revenue—What may be included in—

As to what may or may not be included in rent or revenue it was decided by the Calcutta High Court in *Maharaja Birendra Kishore Manikya Bahadur v Secretary of State for India in Council*[35] that (1) the premium paid for the settlement of waste lands or abandoned holdings may reasonably be regarded as 'rent or revenue' derived from land within the meaning of section 2 (1) (*a*) The argument was that the premium represented the capitalised value of a portion of the rent, and (2) illegal cesses exacted by landlords are not agricultural income and therefore not rent or revenue The above ruling also decided that premium paid for recognition of a transfer of holding from one tenant to another was not to be considered rent and therefore not 'agricultural income', but the same High Court took a contrary view in a Full Bench decision—*Nawabzadi Meher Bano Khanum and others v Secretary of State*[36] and this Full Bench ruling was followed in *Maharajadhiraj of Darbhanga v Commissioner of Income tax*[37] by a Divisional Bench of the Patna High Court

A Full Bench of the Patna High Court decided that mutation, etc, fees, whether legal or not, are agricultural income in so far as they arise from the land[38]

(35) 1 I T C 67 48 Cal. 766
(36) 2 I T C 99, 53 Cal 34
(37) 3 I T C 159
(38) *Raja Rajendra Narayan Deo v Commissioner of Income tax*, 9 Pat. 1.

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(34) *Zamindarini of Tiruvur v Commissioner of Income tax Madras* 3 I T ˉ 428

their operations ceased when they handed over the raw material to their factory branch In so far as they were manufacturers of *refined* sugar, they were carrying on a business which required the adoption of manufacturing processes not ordinarily used by cultivators before disposing of their produce in the market . "

In the *Killing Valley Tea Company's case*[43] the Calcutta High Court found as below —

" The earlier part of the operation when the tea bush is planted and the young green leaf is selected and plucked may well be deemed to be agriculture But the later part of the process (i e, the processes in an up to date large scale Tea Factory) is really manufacture of tea and cannot, without violence to language be described as agriculture "

The taxing of such mixed occupations has always been contemplated The Act of 1886 provided for such taxation and so did the Act of 1918, but no rules were framed by the Government of India to cover such cases Tea estates had escaped taxation for a long time in the belief that the entire operations of tea manufacture were agricultural It was only after the decision of the Calcutta High Court in the Killing Valley Tea Company, which was a test case put forward by Government, that rules were made for taxing income from Tea Companies Rules 23 and 24 of the Income tax Rules set out below prescribe the manner in which and the procedure by which profits and gains shall be arrived at in the case of incomes derived in part from agriculture and in part from business and provide for the separation of industrial from agricultural profits in cases where the agricultural raw produce is worked up for the market *See* also section 59 (2) (*a*) (*i*)

Rule 23 (1) [* * *] In the case of income derived in part from agriculture and in part from business an assessee shall be entitled to deduct from such income the market value of any agricultural produce raised by him or received by him as rent in kind which he has utilized as raw material for the purposes of his business or the sale of receipts of which are included in the accounts of his business The balance of such income shall be deemed to be income derived from the business and no further deduction shall be made therefrom in respect of any expenditure incurred by the assessee as a cultivator or receiver of rent in kind

(2) For the purposes of sub rule (1) "market value" shall be deemed to be —

(*a*) where agricultural produce is ordinarily sold in the market in its raw state, or after application to it of any process ordinarily employed by a cultivator or receiver of rent in kind to render it fit to be taken to market, the value calculated according

(43) 1 I T C 54

ing to the average price at which it has been so sold during the year previous to that in which the assessment is made

(*b*) where agricultural produce is not ordinarily sold in the market in its raw state, the aggregate of—

(1) the expenses of cultivation,

(2) the land revenue or rent paid for the area in which it was grown, and

(3) such amount as the Income tax officer finds, having regard to all the circumstances in each case, to represent a reasonable rate of profit on the sale of the produce in question as agricultural produce

Rule 24 Income derived from the sale of tea grown and manufactured by the seller in British India shall be computed as if it were income derived from business and 40 per cent of such income shall be deemed to be income, profits and gains liable to tax

Rule 23 (1)—

The words "subject to the provisions of rule 24" at the beginning of this rule were cancelled in 1927

Rule 23 (2)—

Clause (*a*)—The 'average' price may be either the average of the prices at which the produce was sold by the cultivator or of those of the market generally Presumably it means the latter for *ex hypothesi* the assessee must have used the whole or the greater part of his produce in the manufacture

Whether the produce is ordinarily sold in the market in its raw state or not, and what is the price at which it is sold are obviously questions of fact On what basis the price is to be calculated is, however, a question of law

'Market' is a vague expression, and all that the rule means here is that if, in practice, the produce has a sale value apart from the demand for the business of the assessee in question Rule 23 (2) (*a*) should be applied, otherwise Rule 23 (2) (*b*)

Clause (*b*) of Rule 23 (2) can come into operation only if clause (*a*) cannot be applied Formerly clause (*b*) (3) was as below

such percentage of the aggregate of (1) and (2) as the Board of Inland Revenue may from time to time fix for the class of produce concerned "

but it had been inoperative as no percentage had been prescribed by the Central Board of Revenue The change in the form of the rule was made in 1927

Rule 24—

As regards tea, when the person growing, manufacturing and selling tea has separate purely agricultural income, *e g*,

from rent or cultivation of land on which tea is not grown, it cannot be taken as his income in calculating the profits of the business If a tea company grows tea seed for its own use, the growing of tea seed must be included in the general business and 40 per cent of the profits taxed, but if separate accounts are kept of receipts and expenditure for the growing of seed, the income from so much of the seed as is sold to third parties may be treated as agricultural Till 1927 only 25 per cent of the profits of Tea Companies was taxed

Agriculture—whether "business" for the purpose of Sec 4 (2) [44]

Expenses of Cultivation—Deductibility of—

The Income tax Manual (para 2) says

"*Although under section 10 (2) (ix) of the Act the only expenditure that can be allowed to be set against profits is expenditure incurred* solely for the purpose of earning the profits or gains taxable in that year, it will only be fair in the case of tea concerns to allow as a charge against profits the whole of the cost of the upkeep *e g* weeding and draining and the extension of the estates which are not in bearing no allowance can be made on account of any capital expenditure in connection with the extensions such as acquisition clearing and draining of the land the making of roads or the erection of buildings before the cultivation begins But when once the cultivation has begun with the completion of the planting only the cost of the upkeep of such extension should be allowed as a business expense even although the extension is not in bearing"

Provisions in the English law which are substantially and for this purpose almost identically—the same as in the Indian law have however been differently interpreted

Estate of a Rubber Company—Upkeep of trees not yielding rubber—Expenditure on—Admissible deduction—

A Rubber Company had an estate, of which in the year in question one seventh only actually produced rubber, the other six sevenths being in process of cultivation for the production of rubber, rubber trees not yielding rubber until they are about six years old Expenditure for superintendence, weeding, etc, was incurred by the company in respect of the whole estate *Held,* that in arriving at their assessable profits the company were entitled to deduct the expenditure for superintendence, weeding, etc, on the whole estate and not one seventh of such expenditure only

Per Lord President—I think the proposition only needs to be stated to be upset by its own absurdity Because what does it come to? It would mean this that if your business is connected with a fruit which is not always ready precisely within the year of assessment you would never be allowed to deduct the necessary expenses without which you

(44) See *E M S T Ponnusuami Pilla v Commissioner of Income tax* set out under section 4 (2), 3 I T C 378

could not raise that fruit This very case which deals with a class of thing that takes six years to mature before you pluck or tap it is a very good illustration but of course without any ingenuity one could multiply cases by the score Supposing a man conducted a milk business it really comes to the limits of absurdity to suppose that he would not be allowed to charge for the keep of one of his cows because at a particular time of the year towards the end of the year of assessment that cow was not in milk and therefore the profit which he was going to get from the cow would be outside the year of assessment the real point is what are the profits and gains of the business? Now it is quite true that in arriving at the profits or gains of business you are not entitled simply because- for what are likely quite prudent reasons—you either consolidate your business by not paying the profits away or enter into new speculations or increase your plant and so on—you are not entitled on that account to say that what was a profit is a profit no more The most obvious illustration of that is a sum carried to a reserve fund It would be a perfectly prudent thing to do but none the less if that sum is carried to a reserve fund out of profit it is still profit and on that income tax must be paid But when you come to think of the expense in this particular case that is incurred for instance in the weeding which is necessary in order that a particular tree should bear rubber how can it possibly be said that that is not a necessary expense for the rearing of the tree from which alone the profit eventually comes? And the Crown will not really be prejudiced by this because when the tree comes to bear the whole produce will go to the credit side of the profit and loss account

Vallambrosa Rubber Co Ltd v Farmer[45]

Rubber—

Income from rubber cultivation is in practice treated as agricultural income even though in some cases it is possible that the methods adopted in preparing the raw material for the market are not exactly those ordinarily employed by a cultivator But the general position in all such cases of mixed occupations is that it is a question of fact how much of the income is agriculture and therefore exempt from income tax and how much from business In the absence of a rule specifying a percentage of profits to be taxed as in the case of tea, the profits should be worked out in each case in accordance with Rule 23 See the *Bhikanpur Sugar Concern*[46] and the *Killing Valley Tea Cases*[47] *already* cited

Salt Pans—

In *Commissioner of Income-tax v Lingareddi*[48] the Madras High Court held that the process of flooding land by letting in sea water, and then extracting sodium chloride by the elimination of other constituents, was not an agricultural purpose

(45) Tax C[illegible] 53
(46) 1 I T C [illegible]9
(47) 1 I T C 54
(48) 20 Mad 763, 7 I T C 363

Sporting rights—

In India this is not of consequence but such income from sporting rights as may exist will presumably not be considered to be 'agricultural income' In the United Kingdom the value of sporting rights is charged on lands under Schedules A and B but it seems fairly clear that 'husbandry' does not include the leasing of 'sporting rights' The charge in the United Kingdom under these two schedules is not on agricultural lands only

Stallion—

In the United Kingdom fees derived from a stallion kept on a farm by serving *outside* mares were considered to be separate source of income from the farm [49] The principle of this decision will presumably apply to India also

Horse breeding—Racing—Stallion—Letting out of—Whether separate enterprises or one—

The assessee owned a racing establishment and a breeding stud at which he raised and trained a number of mares He also bred several stallions which were first tested in the race course and then sent to the stud where they served the assessee's mares and were also let out to serve other mares In order to prevent interbreeding the assessee also sometimes hired other stallions to serve his mares The Commissioners found that the letting out of the stallions was a separate business and chargeable as a 'Trade' *Held,* that there was evidence on which the Commissioners could arrive at the finding In this case the assessee paid tax under Schedule B for the lands occupied by the stud [49a]

Poultry farming—

A poultry farm occupied 33 acres of land on which poultry were raised and a few sheep grazed Most of the food for the poultry was brought from outside Only half an acre of the land was cultivated for green food for winter feeding The farm buildings served as incubating rooms and for storing food *Held,* that having regard to the facts in this case the poultry farming was 'husbandry'

Per the Lord President — I think it may be extracted from (the previous decisions) that lands are properly said to be occupied for husbandry if the trade or business carried on by the occupier depends to a material extent on the industrial or commercial use of the fruits (natural or artificial) of the lands so occupied I say 'to a material extent' because it is notorious that there are many agricultural farms in this

(49) *Malcolm v Lockhart* 7 Tax Cases 99 *McLaughlin v Mrs Blanche Bailey* 7 Tax Cases 508

(49 a) *Earl of Derby v Bassom* 5 A T C 260, 42 T L R 380

country which depend to a large extent upon imported foodstuffs which are not and could not be produced on the lands of such farms"

Per Lord Cullen —"The case is not one of a space having the character of a mere poultry yard used for housing and for artificial feeding and affording exercise to poultry but is one where the poultry derive sustenance to a material extent from the produce of the ground"[50]

A poultry farmer occupied three acres of grass land on which he raised the poultry and grazed a couple of cows in summer and four sheep in winter No part of the land was cultivated and the entire food for the poultry was brought from outside It was argued by the Crown that the profits from the sale of the poultry and eggs were derived from a trade or business *Held* by Rowlatt J that the grass land on which the poultry were kept was used for husbandry *Lean and Dickson v Ball*[50] followed

> It seems to me that he is using the land as land The stock is not all kept in the same place in a yard and the mess cleared away, he moves them from place to place they live to some extent upon the herbage and upon insects and other produce of the soil He moves them about the herbage springs up and the cow comes and eats it and so he works this little bit of land "[1]

Processes applied ordinarily by cultivators—

The test is whether the process employed to render the produce fit to be taken to the market is a process ordinarily employed by a cultivator or receiver of rent in land This is essentially a question of fact, depending on the locality, the crop, the magnitude of the holding, the organisation adopted, etc Like all questions of degree this question is beset with baffling borderland cases Thus the husking of paddy is an agricultural operation, so is the preparation of *gur* or brown sugar, but not sugar refining or the milling of paddy (*See* In re *Bhikanpur Sugar Concern* already cited) Similarly the cultivation and plucking of the tea plant is an agricultural operation but the manufacture of the leaves into a state fit for consumption, with the aid of up to date appliances on a large scale is not such an operation (*See* In re *Killing Valley Tea Company*[3] already cited) In the same way the growing of cotton is an agricultural operation but not its ginning[4]

The word 'cultivator' means the person who 'cultivates', *i e* applies the process of agriculture He need not cultivate

(50) *Lean and Dickson v Ball* 5 A T C " 10 Tax Cases 341
(1) *Jones v Nuttall* " A T C 2 9 10 Tax Cases 346
(2) 1 I T C 29
(3) 1 I T C 54
(4) *Seth Sheolal Ramlal v Commissioner of Income tax* (C P)

with his own hands, but may hire others to do so, and the expression includes a firm or company (See *Killing Valley Company* and *Bhikanpur cases* cited above)

It is clear from the definition that an agricultural process does not necessarily stop short at the removal of the plant from the soil To test whether a particular process is agricultural, the plant in question must in fact be cultivated and the cultivator should ordinarily employ a process to render the produce fit for the market The "market" implies a real centre of economic exchange *Held accordingly in a case in which there was no* market except a jail which sometimes purchased raw aloes and no standard of comparison of processes ordinarily employed by cultivators and the assessee cultivated aloe plants and prepared with the help of machinery fibre which he sold, that the entire process including the preparation of the fibre was agricultural[5]

Buildings—

Agricultural buildings are exempt from taxation only if (1) they are *on or in the immediate vicinity of the land, (2)* the receiver of rent or revenue or the cultivator, etc requires as a dwelling house, store house or other out building and (3) so requires it because of his connection with the land All these three conditions should be satisfied

Exemption on notional income—

The exemption of the building is on the notional income and not on the actual income, because unless the owner occupies the building, there can be no exemption, and if he occupies it, the income must be notional[6]

Immediate Vicinity—

There are no decisions as to what constitutes "immediate vicinity" Zemindar's dwelling houses and kacheries have in practice been exempted and the question of what constitutes "immediate vicinity" *is one of fact, and it is not open to the* assessee to claim some building to be a dwelling house, etc, without regard to facts[6]

Connection with land—

In *Maharajadhiraj of Darbhanga v Commissioner of Income tax,*[7] the Patna High Court ruled that a guest house which was really part of the landlord's dwelling house but built separately owing to custom was not taxable, the dwelling house itself being exempt from tax

(5) *J M Casey v Commissioner of Income tax Bihar and Orissa* 1930 A I R. Pat 44

(6) *Raja Rajendra Narayan Deo v Commissioner of Income tax* 9 Pat 1

(7) 3 I T C 158

In *Raja Rajendra Narayan Deo v Commissioner of Income tax*,[7] it was argued by the Revenue that 'requires' means 'needs' and that the words "by reason of his connection with the land" mean "for the purpose of agriculture—in the particular case that of collecting rent or revenue" It was held that the word 'requires' means that the assessee demands to appropriate the building for the purpose of a dwelling house, etc The words "by reason of … land" merely explain the nature of the class of persons entitled to exemption The verb 'requires' is separated by a comma from the grammatical subject and the phrase "by reason of … land," but the words "by reason of … land" are not separated by a comma or otherwise from the words "the receiver of the rent …" The phrase "by reason of" has therefore a qualitative and not a quantitative significance One cannot add the words "for agricultural purposes" to the statute so as to say that unless the building is required for such purposes, its value is not exempt

It might be open to the Department to hold that a particular building because of its size or situation is not a building which the receiver of rent or revenue requires by reason of his connection with the land as a dwelling house, and in that case the entire value of the building could be taxed, but once you admit that the building is required you cannot allocate it between agricultural and non agricultural purposes[8]

(2) assessee means a person by whom income-tax is payable

Assessee—

Income tax can become *payable* only after the liability to pay has been determined by the Income tax Officer under section 23 Before such assessment, the person is not an assessee The fact that the Income tax Officer had wrongly determined the liability would not make the person any the less an 'assessee' *See* section 30 Every person as defined in section 2 (2) and General Clauses Act, section 3 (39), can be an 'assessee' Under the latter 'person' includes any company or association or body of individuals whether incorporated or not

In some sections, *e g*, section 24, section 64, the word has not been used in the strict sense of the definition Even in sections 7 to 16, the word is not used in the strict sense It is only after computing a person's income that his liability to tax can be determined

A person declared not liable to tax is not an 'assessee'—see notes under section 30 In *Govind Saran v Commissioner*

(7) 9 Pat 1
(8) *Raja Rajendra Narayan Deo v Commissioner of Income tax*, 9 Pat 1

of Income tax,[9] the Chief Court of Lucknow suggested that if the representative of a deceased person's estate was an assessee for the purpose of liability to pay, he was also an assessee for the purpose of claiming a refund

Income tax includes super tax *See* section 55, which defines super tax as an 'additional duty of income tax' and also section 58 which lays down which sections of the Act do not apply to super-tax

History—

In the 1886 Act there was no definition of 'assessee' In the 1918 Act the definition of 'assessee' was "a person by whom income tax is payable and includes a firm and a Hindu undivided family" In the 1922 Act it was proposed to expand this so as to include a partnership also but the Select Committee considered that the proper place to lay down liability, etc, was the charging section (section 3) and dropped the latter part of the definition altogether

Liability to tax of different kinds of assessees—

As regards the liability to tax, *see* sections 3 and 55—the charging sections for Income tax and Super tax respectively Under section 3 income tax is payable by every individual, Hindu undivided family, company, firm and other association of individuals Under section 55 super tax is payable by every individual, Hindu undivided family, company, unregistered firm or other association of individuals not being a registered firm The only distinction between the two sections is in regard to firms All firms whether registered or not are liable to pay income tax, but unregistered firms alone are liable to super tax The profits of registered firms are charged to super tax in the hands of the partners if they are personally liable As regards the distinction between a registered firm and an unregistered firm, *see* section 2 (14)

Firms—Partners of—

As to how far a firm is a separate assessee from its partners *see* the remarks of Schwabe, C J, in *Commissioner of Income tax v M Ar Arunachalam Chetti*[10] in which he discussed the position of partners of firms with reference to claims to 'set off' under section 24

(3) ' Assistant Commissioner means a person appointed to be an Assistant Commissioner of Income-tax under section 5

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(9) Set out under section 66
(10) 1 I T C 278

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(a) 9 Pat 1

(8) *Raja Rajendra Narayan Deo v Commissioner of Income tax*, 9 Pat 1

of Income tax,[9] the Chief Court of Lucknow suggested that if the representative of a deceased person's estate was an assessee for the purpose of liability to pay, he was also an assessee for the purpose of claiming a refund

Income tax includes super-tax *See* section 55, which defines super tax as an 'additional duty of income tax' and also section 58 which lays down which sections of the Act do not apply to super tax

History—

In the 1886 Act there was no definition of 'assessee' In the 1918 Act the definition of 'assessee' was "a person by whom income tax is payable and includes a firm and a Hindu undivided family" In the 1922 Act it was proposed to expand this so as to include a partnership also but the Select Committee considered that the proper place to lay down liability, etc, was the charging section (section 3) and dropped the latter part of the definition altogether

Liability to tax of different kinds of assessees—

As regards the liability to tax, *see* sections 3 and 55—the charging sections for Income tax and Super tax respectively Under section 3 income tax is payable by every individual, Hindu undivided family, company, firm and other association of individuals Under section 55 super tax is payable by every individual, Hindu undivided family, company, unregistered firm or other association of individuals not being a registered firm The only distinction between the two sections is in regard to firms All firms whether registered or not are liable to pay income tax, but unregistered firms alone are liable to super tax The profits of registered firms are charged to super tax in the hands of the partners if they are personally liable As regards the distinction between a registered firm and an unregistered firm, *see* section 2 (14)

Firms—Partners of—

As to how far a firm is a separate assessee from its partners *see* the remarks of Schwabe, C J, in *Commissioner of Income tax v M Ar Arunachalam Chetti*[10] in which he discussed the position of partners of firms with reference to claims to 'set off' under section 24

(3) Assistant Commissioner means a person appointed to be an Assistant Commissioner of Income-tax under section 5

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(9) Set out under section 66
(10) 1 I T C 278

See notes under section 5 as to how Assistant Commissioners are appointed, their duties and powers under the Act, etc

(4) "business includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture,

The definition of 'Business' was first introduced in the Act of 1918 In the Act of 1886 incomes from this head fell under Part III—profits of Joint Stock Companies or Part IV—other income as the case may be

The definition of 'business' in the Indian law is a little wider than the corresponding definition of 'trade' in the English law, *in which the word 'business'* has *not* been used 'Trade' has been defined in the English Income tax Act, 1918, as "*including* every trade, manufacture, adventure or concern in the nature of trade "

'Includes'—The question whether this word means merely 'includes' or 'means and includes' has been discussed but not decided In the *Royal Calcutta Turf Club* v *Secretary of State*[11] it was argued on behalf of the Crown that the definition was *not* exhaustive but the point was not decided Attention was drawn to other definitions in the Act in which the word "means" was used when an exhaustive definition was contemplated The case was one under the Excess Profits Duty Act but the definition of 'business' in that Act was identical with the definition in the present Income tax Act

'Business' has a more extensive meaning than the word 'trade'[12] but ordinarily speaking 'business' is synonymous with 'trade'[13] In *Smith* v *Anderson*,[14] Jessel, M R, after citing definitions of 'business' from several dictionaries said "anything which occupies the time and attention and labour of a man *for the purpose of profit* is business " Further on he remarks —

"There are many things which in common colloquial English would not be called a business when carried on by a single person which would be so called when carried on by a number of persons For instance a man, who is the owner of a house divided into several floors if used for commercial purposes *e g*, offices would not be said to carry on a business because he let the offices as such But suppose a company was formed for the purpose of buying a building or leasing a house to be divided

(11) 1 I T C 108, 48 Cal. 844
(12) *Harris* v *Amery* 35 L J C P 92 L R 1 C P 148
(13) *Delany* v *Delany* 15 L R I Y 67
(14) 50 L J Ch 43, 15 Ch D 258

into offices and to be let out—should we not say if that was the object of the company that the company was carrying on business for the purpose of letting offices? The same observation may be made as regards a single individual buying or selling land with this addition that he may make it a business *and then it is a question of continuity* *When you come to* an association or company formed for a purpose, you will say at once that it is a business because there you have that from which you would infer continuity So in the ordinary case of investments a man who has money to invest, the object being to obtain his income, invests his money and he may occasionally sell the investments and buy others but he is not carrying on a business" (Stroud)

(This portion of the decision was not affected though it was reversed on appeal, but the above decision was given with reference to the English Companies Act and not for income tax purposes) But there may be a business without pecuniary profit being at all contemplated In this sense 'business' is a much larger word than 'trade'[15] The keeping of a lodging house, for instance, would be a 'business' A covenant not to permit the carrying on of any 'trade' or 'business' was held to be broken by allowing the premises to be used as an out patients branch of a hospital[16] In interpreting a restrictive covenant it was held that a Boys' school[17] constituted a 'business' But this aspect of the definition does not very much affect Income tax Law which is concerned only with such 'business' as yields profits It has been held that a Council of Law Reporting, for instance, carried on if not 'trade' certainly 'business'[18] On the other hand there may be a sequence of acts from which profit is anticipated without a 'business' being constituted Thus, where a Barrister occupying a house and 79 acres of land as a private residence, which he had originally taken for pleasure, used some of the land for breeding cattle and horses and raising vegetables, fruits and flowers which he sold and he also occasionally bought and sold cattle and horses *it was held on the evidence that he did not carry on 'business'*[19] (This decision, however, was given under the Bankruptcy Act) But there may be a business without any sequence of acts for "if an isolated transaction, which if repeated would be a transaction in a business, is proved to have been undertaken with the intent that it should be the part of several transactions in the carrying on of a business, then it is a first transaction in an existing business"[20] (This again was decided under the Bankruptcy

(15) *Rolls v Miller* 53 L J Ch 101
(16) *Bramwell v Lacy* 10 Ch D 691
(17) *Kemp v Sober* 20 L J Ch 602
(18) 58 L J Q B 90
(19) Re *Wallis Exp Sully* 14 Q B D 950
(20) Re *Giffin*, 60 L J Q B 235

Act) In re *Kaladan Suratee Bazaar*[21] a decision under the Excess Profits Duty Act, the Rangoon Chief Court held that a registered limited company owning house property consisting of stalls and tenements let out for rents and distributing the rents collected as dividends to its shareholders was not carrying on a business within the meaning of section 2 of the Excess Profits Duty Act

But an important point to be remembered in distinguishing 'business' for income tax purposes from 'business' for other purposes, *e g*, under the Partnership or Bankruptcy Acts, is that under the Income tax Act 'business' does not include a profession, a partnership is possible between two or more professional persons but such a partnership would not be treated as a 'business' under the Income tax Act, though under the Contract Act such partnership would be a 'business'

Trade—

Trade in its largest sense is the business of selling with a view to profit goods which the trader has either manufactured or himself purchased —Per Lord Davey in *Grainger v Gough*[22]

Buying in itself does not constitute a 'trade' Unless the selling also is taken into account there are no profits —See per *Lord Watson, ibid*

I do not think there is any principle of law which lays down what carrying on trade is There are a multitude of things which together make up the carrying on of a trade but I know of no one distinguishing incident which makes a practice a carrying on of trade and another practice not a carrying on a trade If I may use the expression it is a compound fact made up of a variety of incidents —Per the M of R Jessel in *Erichsen v Last*[23]

When a person habitually does and contracts to do a thing capable of producing profit and for the purpose of producing profit he carries on a trade or business —Per Cotton, L J *ibid*, quoted with approval by Esher M R in *Werle v Colquhoun*[24]

Obviously no man can trade with himself and it follows therefore that several persons whose interest in a transaction are identical cannot be held to 'trade' among themselves, *e g*, members of mutual societies, etc, in respect of transactions among themselves[25]

'*Commerce*' is traffic, trade or merchandise in buying and selling of goods' (Stroud)

(21) 1 I T C 50
(22) (1896) A C 345 3 Tax Cases 462
(23) 4 Tax Cases 422
(24) 2 Tax Cases 402
(25) *Dublin Corporation v McAdam*, 2 Tax Cases 387

'Manufacture'—No mere philosophical or abstract principle can answer to the word 'manufacture' Something of a corporal and substantial nature something that can be made by man from the matters subject to his art and skill or at the least some new mode of employing practically his art and skill, is required to satisfy the word"[26] (Stroud)

"To work up (material) into forms suitable for use"—(Murray's New English Dictionary) "The operation of reducing raw materials into a form suitable for use by more or less complicated processes"—(Annandale's Concise English Dictionary) 'To make from raw materials by any means into a form suitable for use'—(Chamber's Twentieth Century Dictionary)

Manufacture can perhaps be easily distinguished from Trade and Commerce, but it is difficult to distinguish *inter se* between the latter But the distinction is of no consequence as the definition of 'business' includes both and there is no provision in the Act under which it is necessary to distinguish between the two

'Adventure or concern in the nature of trade, commerce or manufacture'—

These words are used to bring into the net transactions of a somewhat doubtful nature The word 'adventure' connotes the idea of 'risk', however remote, which almost every transaction made for profit bears The word 'concern' implies a certain element of continuity though, as will be seen from the rulings set out later, repetition of transactions is not necessary The essential features *in the nature* of trade, commerce or manufacture are (1) an element of profit—involving buying and selling, (2) such profit ordinarily being the purpose of the transaction, and (3) a certain degree of continuity—actual or possible but all these features need not exist together See notes under section 3 (distinction between Capital and Income) and under section 4 (3) (vii) (casual receipts not arising from a business)

In the nature of Trade, etc"—

In *Liverpool and London and Gloge Insurance Company v Bennet*[27] it was held that the words 'in the nature of trade' used in the definition qualified only 'concern' and not 'adventure', therefore the entire business of an Insurance Company was its 'adventure', though a part of its business was that of making investments as an ancillary to its main business This question arose with reference to the question whether the company should be taxed in the United Kingdom on the whole of its profits wherever arising The same question cannot arise under the Indian

(26) *Vf Gibson v Frank* 4 M & G 199 11 L J C P 177
(27) (1913) A C 610

law but the principle of the above decision is evidently applicable to India also In the case of Insurance Companies special rules have been made in this country—*see* Rules 25 to 35, but in the case of other business the question may arise for the purpose of determining the liability to tax of profits when brought into the country under section 4 (2), whether interest from investments abroad is profits from 'business'.

Destination of profits—Not relevant—

Whether an adventure or concern is a business or not is not affected by how its profits are ultimately disposed of See *Trustees of Psalms and Hymns* v *Whitwell*,[28] *Religious Tract and Book Society* v *Forbes*,[29] *Grove* v *Y M C A*,[30] *Mersey Docks* v *Lucas*,[31] *Coman* v *Governors of Rotunda Hospital and others*,[32] set out under section 3 which show that the destination of profits or the motive with which the profits are made is immaterial

Trade or no trade—Difficulty of defining—

It is not possible to lay down definite lines to mark out what is a business or trade or adventure and to define the distinctive characteristics of each, nor is it necessary or wise to do so The facts in each case may be very different and it is the facts that establish the nature of the enterprise embarked upon —Per the M of R Pollock in *Martin* v *Lowry*[33]

Taking into account the ordinary occupation of the appellant, the subject matter of his purchase and sale, the method adopted for disposal, the number of operations and the period occupied, there is ample evidence to support the findings of the Commissioners that the appellant carried on a trade —*Per Atkin, L J, ibid*

A series of retail purchases followed by one bulk sale or a single bulk purchase followed by a series of retail sales may well constitute a trade —*Per Sargant, L J, ibid*

It is possible that, while each independent transaction may not by itself constitute a trade, *i e*, other persons sharing in the profits will not be liable to tax on the ground that the profits were casual, the transactions taken together may constitute a trade Thus a person, who bought, liquidated and reconstructed a number of companies, the persons working with him and sharing the profits being different in each transaction, was held to carry on a trade, though the other persons were not so held[34]

(28) 3 Tax Cases 7
(29) 3 Tax Cases 415
(30) 4 Tax Cases 613
(31) 1 Tax Cases 385, 2 Tax Cases 25
(32) 7 Tax Cases 517
(33) 5 A T C 11 11 Tax Cases 297
(34) *Pickford* v *Quirke*, 6 A T C 525

See also the decisions set out under section 3 (capital receipts) and section 4 (3) (vii) (casual profits)

Advances—In course of business, trade or investment—

A company in the course of a wool broking business, granted temporary advances on the security of second mortgages, or on wool and produce The advances fluctuated in amount as the produce was realised *Held*, that the interest from the advances was profits of a trade and not interest from investments even though some of them were secured by real property

Per the Lord President — It appears to me that the sort of trade in which they are engaged is partly the trade of a broker, and partly the trade of a banker it seems to me to be not at all of the nature of investments of money On the contrary the advances are of the most irregular and fluctuating description I think this is proper trading and nothing else, and not investment of money upon securities "

Scottish Mortgage Company v *McKelvie*[35] and *Smiles* v *Northern Investment Company*,[36] distinguished *Smiles* v *Australasian Mortgage and Agency Company, Limited*[37] *See* however, notes as to the meaning of ' In the nature of trade ' on p 193 *ante*

Liquidator—Steam power—Supply of—By—

A trustee liquidating an insolvent firm of spinners continued to supply steam power at a profit to the lessees and others It was contended that as he did not carry on any other part of the firm's business and that as the supply of power was being made in order to assist in the realisation of the assets to the best advantage, the profits were not from a 'trade' but an accidental result from the liquidation of a previously existing loss *Held*, that the supply of power was a 'trade' and the profit therefrom taxable *Armitage* v *Moore*[38]

House Property—Profits from—

A company invested its capital in house property and kept an office and a staff of collectors for the collection of rents and for letting out the property *Held*, that it was not carrying on 'business' A company holding house property and distributing rents as dividends to its share holders is not carrying on 'business' for though it is an association for acquiring gain, its method is passive by owning property and not active by carrying on

(35) 2 Tax Cases 165
(36) 2 Tax Cases 177
(37) 2 Tax Cases 367
(38) 4 Tax Cases 199

business In re *Kaladan Suratee Bazaar Coy*[39] The above decision was given under the Excess Profits Duty Act, section 2, of which defined 'business' in exactly the same way as the present Income tax Act But under the Income tax Act the profits are taxable as income from 'property'—*See* notes under section 9

Inventor—Director—Company promoter—Whether carrying on business—

An assessee had for many years been an inventor and had been granted nearly four hundred patents Of these he had only sold one, and that was twenty five years before the period of assessment in question He was managing director of a company which worked some of his patents and paid him a fixed salary and commission dependent on results, and he was also managing director of, and principal share holder in, another company of which he was the promoter and which paid him royalties on non exclusive licences in respect of some of his patents granted by him to the company He was also a director of several other manufacturing companies *Held,* that he was not carrying on a trade or business (*a case under the Excess Profits Duty Act*)

Per Rowlatt, J — The (assessee) is managing director of a company that is not, nor is being a shareholder, carrying on a business He is also an owner of royalties That again is not carrying on business But those are the whole sources of his income It is true that he is adding to his royalties and he is performing his duties of managing director of the company and it may be very advantageous that he has those positions—that he has that particular form of property and is creating more but I do not think those matters can be added together and that it can be said in what I cannot help describing as a loose way Look at the general position I think the (assessee's) position must be dissected and what his income is really derived from must be ascertained In my judgment it is derived from those three distinct sources and he is not in respect of each or all of them put together, deriving this royalty income from a business

It is said that if a person habitually invents, or habitually paints pictures or habitually writes books with a view to gain from the patents when he has taken them out, the books which he has written and the pictures which he has painted, that is carrying on a business and I feel a little difficulty about it Very possibly if a person habitually paints a number of pictures year after year and sells them it would be said that he was carrying on a business He might be a professional man, but that is another matter If he was writing books habitually year after year and carrying on a business I suppose he would be assessable under Schedule D in respect of it If he was inventing patentable devices year

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(39) 1 I T C. 50

after year and selling them and gaining an income it would be difficult perhaps to say that he was not carrying on a business—I do not know whether that could be said—and if he kept on developing land and selling year after year he would be carrying on a business On the other hand (Counsel for assessee) asks "Supposing he has land and keeps on build ing on it and never sells it at all but has rent from the houses that he builds is he carrying on a business?" One cannot help feeling that the answer to that question must be 'No ' because he is merely investing his money in new property and keeping it he is not dealing with it in any way

Now the (assessee) does not sell his patents He sold one twenty five years ago but it is quite clear that that is not the way in which he deals with the produce of his inventive ability He simply keeps on inventing things and keeping the patent in his own hands making what he can out of it by granting licences just as a man builds a house and makes something out of it by letting it Of course a painter cannot as things are do otherwise than sell his pictures An author is more like an inventor because he can grant licences under royalties

It seems to me that the true position is that unless it can be shown that the property called into existence by the invention or by the paint ing is sold so as to obtain a money return against it no evidence is produced that the inventor or the artist is carrying on a business If the artist or the inventor sells the product of his ability in many cases inquiry would have to be made whether he does so habitually as to bring him within the category of persons who carry on a business but if he does not sell at all I do not think there is any evidence in support of the contention that he carries on a business

It is said for the Crown that by granting these licences the (assessee) is putting his patent on the market So he is but so is the man who builds a house and lets it It seems to me that carrying on a business involves in a case like this the disposal of the article which is produced as opposed to retaining it as a valuable thing in itself which can be treated as an investment just as anything bought with the money obtained for it if it had been sold could be treated as an investment On those grounds I think that the (assessee) cannot be regarded as carrying on a business

I think it better not to say anything upon the question whether if I had held he was carrying on a business I should have held that his business was a profession *Inland Revenue Commissioners v Sangster*[40]

Business—Motive of—Immaterial—

Per Lord Coleridge C J — It is not essential to the carrying on of a trade that the persons engaged in it should make or desire to make, a profit by it '

(40) (1920) 1 K B 587 12 Tax Cases 208

Per Mansty J—"If the Council in the present case make a profit they are liable to pay income tax upon it" *Commissioners of Inland Revenue v Incorporated Council of Law Reporting*[41]

Business—One or many—Fact—

Whether a business is one or many is a question of fact[42] On this may depend important issues *e g* whether particular profits arise from business or otherwise (very important when profits arise from isolated transactions of a speculative nature or from mere appreciation of capital) questions of succession and discontinuance all of which are questions of fact As to the multiplicity of businesses being a question of fact see *Gloucester Railway Carriage Coy v Commissioners of Inland Revenue*[43]

In *Farrell v Sunderland Steamship Company*[44] it was held that ordinarily a whole ship was a separate trade from that of another ship in which the company owned only a share As already stated, however such questions are primarily questions of fact

Business—Question of fact—

As to the extent to which the existence of a 'business' is a question of fact and how the Income tax Officers should give their findings, see per *Justice Rowlatt in Mellor v Commissioners of Inland Revenue*[45] quoted below

The question is whether the profits made by the financial operation in regard to these two mills and the stock was a profit of his stock broker's business Now it does not appear that he is found to be a stock dealer That is the first difficulty In paragraph 2 it is stated that he bought shares sometimes not knowing whether he would sell them again and not having an immediate purchaser for them and that he sometimes resold them if he found a purchaser and he kept them if he did not and so on It does not state whether he was doing that as a stock dealer or whether he was doing that as any person with a fancy for playing with investments might do It does not appear that he sold them as a stock broker to his clients or that he sold them in any market where he operated as a stock dealer It is quite vague It is only thrown in as a sort of argument it is thrown in argumentatively and I do not find that there is any finding in this case that he really was a stock dealer That question is not faced

"Then further I do not think there is any finding that these profits or gains were the profits or gains of the business assessed which is

(41) 3 Tax Cases 105

(42) *Brit Potter and Hughes v Commissioners of Inland Revenue* 6 A T C 23 12 Tax Cases 9 6

(43) (19?5) A C 469 12 Tax Cases ?0

(44) 4 Tax Cases 605

(45) 3 A T C 6?9

called stock broking One of the contentions set out is that the business ought to be dissected and these profits ought to be separated from the stock broker's business That is certainly an argument How is it dealt with? There are really only three findings in the case One is that it is not an isolated transaction the second is that it is not an investment and third that it is done for the purpose of gain

"Now the Attorney General says that reading that with the form of the assessment and the contentions the result is that the Commissioners have found that the profits were those of a stock broking business But I do not think so It seems to me that the tribunal in a case like this must be made to find the very fact in dispute they must find that it is part of the stock broker's business

"Now if this gentleman had dealt in furniture or in pigs or in horses outside his business all these questions would have been answered in precisely the same way The argument would have been that it is not part of the stock broker's business and ought to be dissected That argument is stated here The Commissioners find that it is not an isolated transaction *That would be also true in the other case They also find* that it is done for the purpose of gain That is also true They also find that it is not an investment That is also true But that is all that is found in this case

' It seems to me it would be very dangerous indeed to allow tribunals whether they are Income tax Commissioners or juries or anybody else not to face the real issue but to find a person liable upon a series of conclusions upon matters of argument which throw light upon the question and then merely because they have found for one side to say that they necessarily must have found all the things to which they ought to have addressed their minds the question being whether they did do so or not

I think the case must go back to the Commissioners to say whether or not in terms these profits were the profits of the stock broking business "

The question of what is the business of the company is apparently a pure question of fact and the matter is one which is for the revenue authorities and the revenue authorities alone—Per Robinson C J in *Ahlone Land Company* v *Secretary of State for India* '[46]

In the above case it was conceded on behalf of the Assessee Company that the whole question turned upon what was the business of the company and that if it was the buying and selling of land the company would be liable to tax[47]

The most extreme exposition of this principle that the carrying on of a business is a question of fact was in *Edwards* v

(46) 1 I T C 167

(47) See also *Currie* v *Inland Revenue Commissioners* (1921) 2 K B 332 and *Cape Brandy Syndicate* v *Inland Revenue Commissioners* 1 A T C 298 which were followed in the above case and are set out under sections 66 and 4 (3) (vii) *infra*

Old Bushmills Distillery Coy.[48] In this case a company went into liquidation in August, 1920 In order to sell the business as a going concern the liquidator continued distilling but on a reduced scale The distillery was put up for sale in March, 1921, but was not sold as no purchasers offered For the year ending 5th April, 1921 the liquidator, *i e*, the company, was assessed to income-tax The Special Commissioners upheld the assessment but the Recorder of Belfast cancelled it on the ground that the receipts were capital received in the course of winding up For the year ending 5th April, 1922, the company was again assessed to income-tax The company appealed and the Special Commissioners cancelled the assessment as they felt bound by the decision of the Recorder The Crown appealed and it was finally decided by the House of Lords (approving the decisions of the Court of Appeal and the K B Division for Northern Ireland) that the case should be sent back to the Commissioners to find on the facts, independently of the Recorder's decision for 1920-21, whether a business had been carried on in 1921 22

Person—More than one business—Carrying on—

There is nothing to prevent a person carrying on more than one business or exercising more than one profession[49] See also the cases under Mixed Occupations under Agricultural Income, *supra* section 2 (1).

Consulting Engineer—Fees—When treated as income from business—

The assessee was a skilled engineer who acted both as consulting engineer and as an inventor. As a consulting engineer he advised his clients to instal new machinery the orders for which were placed through him In supplying his clients with the machinery he charged them an inclusive price which covered three items, *viz* (1) a merchant's profit to himself for getting the machinery (2) an engineer's fee for his advice, and (3) he also arranged that machinery under his patents was to some extent provided He claimed that deductions should be made on account of item (2) in assessing him to Excess Profits Duty on the ground that they were not profits from business. *Held* by the Court of Appeal that the assessee was not carrying on a profession but was carrying on a merchant's business in which

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(48) 10 Tax Cases 285

(49) *Commissioners of Inland Revenue v Maxse* (Magazine Editor and Proprietor) (1919) 1 K B 647, *Inland Revenue v Ransom* (growing herbs and manufacturing chemicals), (1918) 2 K B 709, *Egyptian Hotels, Ltd. v Mitchell*, (1915) A C. 1022

he brought his professional skill to bear. *Commissioners of Inland Revenue* v *Marx*[50]

Though this was an Excess Profits Duty case, the principle of the decision is of general application Income in such cases should be assessed as income from business (section 10) and not as professional earnings (section 11)

See also the Excess Profits Duty cases referred to under section 11 as to the distinction between 'Business' and 'Profession'.

Executors—Carrying on business—Whether taxable—

"Executors may not trade as a general rule but they may do certain things which are from other points of view trading without offending against the prohibition that they may not trade, that is to say, they may trade to the extent of winding up the business they find left to them by the testator '—*Per Rowlatt, J*[1]

But it was held by the Court of Appeal on the particular facts of the case that there was no trade

Per the M of R —"It seems to me that the evidence shows that the executors only dealt with the business only handled the business for the purpose of securing the proper advantage to the estate of the testator Of course it is largely a question of degree as to whether or not a business is being carried on by the executors for their own purposes or not "[1]

Beneficiaries interest—Receipt of shares of a company in exchange—Company doing 'business' and not an executor or trustee—

A company was formed for administering property in which a number of beneficiaries under a will were interested. Each beneficiary assigned his interest in the estate to the company receiving shares in exchange A good part of the estate was under lease to collieries, and this was the principal income of the company The company claimed that it was only an executor or trustee for the beneficiaries under the will and was not doing 'business' but was in effect a landowner The Special Commissioners and the High Court accepted this claim, but the Court of Appeal unanimously rejected it

" The company has become the absolute legal and beneficial owner of the estates and no relation of trustee and *cestui que trust* exists between it and the beneficiaries They are relegated to the ordinary position and rights of shareholders and there is no time limit whatever to the activities of the company "[2]—*Per Sargant, L J*

(50) 4 A T C 467

(1) *The Executors of E J Cohan* v *Commissioners of Inland Revenue*, 12 Tax Cases 602

(2) *Commissioners of Inland Revenue* v *Westleigh Estates*, 3 A T C 17

A company of this sort should perhaps be taxed in India under section 10 instead of under section 12, and if its income was agricultural, such income would of course be exempt under section 4 (3) (viii)

Mutual Trading Societies—Transaction with members—Surplus from —Whether liable—

A company limited by guarantee carried on insurance business (other than life insurance) The number of members was unlimited Each insurant became *ipso facto* a member during the period of contract Each member paid an entrance fee and the Directors set aside and invested reserve funds and could call on the members for the general expenses The sums in which members were insured could be increased or decreased according to the risk involved by the policy—so as to lead to equitable contributions from each It was held (with reference to Corporation Profits Tax) by Rowlatt, J, following *New York Life Insurance Company* v *Styles*[3] and *Commissioners of Inland Revenue* v *Eccentric Club*,[4] that the company was not carrying on trade or business But this was upset by the Court of Appeal on the following grounds —(1) The House of Lords' decision in the *New York Life Insurance Company case* decided only whether such profits are taxable—not whether the company was carrying on a trade The speeches of Lords Watson and Bramwell in so far as they say that the company did not trade, are only *obiter dicta*, (2) section 53 (2) (*h*) of the Act imposing Corporation Profits Tax explicitly says that profits in the case of mutual trading societies shall include the surplus arising from transactions with members, (3) in the *Arthur Average Associa-* mutual trading societies shall include the surplus arising from *tion case*[5] and *Padstow Total Loss and Collision Assurance Association*[6] the Court of Appeal held (though under the Companies Acts) that a mutual association could do 'business', (4) the *Eccentric Club case* was determined with reference to the peculiar features of a Social Club On appeal the House of Lords confirmed the decision of the Court of Appeal *Cornish Mutual Assurance Company* v *Commissioners of Inland Revenue*[7]

In the absence of a provision corresponding to section 53 (2) (*h*) of the United Kingdom Act of 1920, this decision cannot apply either to Indian Super tax or Income tax

(3) 2 Tax Cases 460
(4) (1920) 1 K B 390
(5) 10 Chancery Division 542
(6) 20 Chancery Division 137
(7) 5 A T C 82

Royalties annuities or dividends—Receiving and Distributing—

In *Commissioners of Inland Revenue v Marine Steam Turbine Co* [8] it was held by the High Court that a company doing nothing else than merely receiving royalties which were in effect payments by instalments of the price of the property sold, and distributing dividends to shareholders out of such royalties, is not doing 'business' But this decision was overruled in the *Korean Syndicate case* [9] in which a company, one of whose purposes *inter alia* was to acquire and work concessions acquired a mining concession and without working the mine itself leased it to another company, receiving in return a percentage of profits as royalty it was held by the Court of Appeal that the first company carried on business' The House of Lords approved of the principle laid down by the Court of Appeal in the *Korean Syndicate case* [9] in the following case

A company was formed in 1895 to acquire and carry on a railway under a contract with the Government of India In 1906 the company sold the whole undertaking to the Government in return for an annual payment of £30 000 or a payment of a certain sum if and when Government determined the arrangement

Per L C Cave — It is true that its principal and only function at the present moment is to receive and distribute the fruits of its undertaking but that is a part and a material part of the purpose for which it came into existence

Per Lord Sumner — To ascertain the business of a limited liability company one must look first at its memorandum and see for what business that provides and whether its objects are still being pursued — *Korean Syndicate case* [9] The important thing is that the old business still continues of getting some return for capital embarked in the line Business is not confined to being busy in many businesses long intervals of inactivity occur —*South Behar Railway Company v Commissioners of Inland Revenue* [10]

Investment by a Shipping Company—Business—

A Shipping Company one of whose objects was "to invest and deal with the moneys of the company not immediately required upon such securities etc ' had five ships on the date of outbreak of the War One of these ships was sold, three sunk and one detained by the enemy The insurance money and the sale proceeds received on account of the ships were invested *Held* that the company was carrying on a 'business'

(8) (1920) 1 K B 193 12 Tax Cases 174
(9) (1921) 3 K B 258 12 Tax Cases 181
(10) (1925) A C 476 12 Tax Cases 657

(Corporation Profits Tax Case) Commissioners of Inland Revenue v *Dale Steamship Company*[11]

Rents received by a company—When treated as income from business—

A company was formed in 1899, its objects being, among other things, to acquire and take over the assets and liabilities of the proprietors of the Theatre Royal, Birmingham The old proprietors were a joint stock company, who were landowners only and did not work the theatre but had merely received the rents The new company, on the other hand acquired the Theatre Royal and other properties subject to an existing lease Later on, the theatre was rebuilt During the several years under appeal the whole of the real estate belonging to the company was let to five tenants under leases, the period of which was in no case less than eighty nine years The income of the company consisted of the rents payable under the leases and of interest and dividends on investments The company contended that it did not carry on a 'trade' or 'business' *Held* that the company was carrying on a trade or business within the principle laid down by the Court of Appeal in *Commissioners of Inland Revenue* v *Korean Syndicate Ltd*

Per Rowlatt J—Now the question arises whether the company was carrying on business Undoubtedly it was it was enjoying the turning to account of the property which it was formed among other things, to turn to account but the form in which its revenue came in was the comfortable form of simply receiving rents

What I should like to have known of course was this If my way of looking at the facts had not been questioned at all would it then have been said that it is quite enough to make a company carry on business if it is simply receiving rents which it had arranged for in the course of turning to account the property it has to turn to account I very much wish that the Court of Appeal in the *Korean Syndicate Case*[12] could have seen their way to say that if they meant to say it I do not think Lord Justice Younger meant to say it nor has anybody said as far as I can see that the mere fact that it is a company carrying on something, makes that something a business when it would not have been a business if a private person had been carrying it on Nobody has gone the length of saying that but it is obvious from what the Master of the Rolls said that when you are considering whether a certain form of enterprise is carrying on business or not it is material to look and see whether it is a company that is doing it In the present case I think the inclination of my mind on the whole is in favour of the Crown, because it seems to me that looking at what the company were incorporated to do they applied

(11) 12 Tax Cases 712

(12) (1921) 3 K B 258, 12 Tax Cases 181.

themselves to that and they were fairly active in the early years in arranging their property, and during those years they enjoyed it and there is nothing more for them to do but they have not gone out of their business and been left merely with the rents to collect One can understand that a company might have had a large factory or something of the kind which ceased to manufacture but here they had property left in their hands and they continued to draw rents and so on One might say in that case that they were not carrying on business but as you are to look at the fact that they are a company and as you are to look at the objects with which they were incorporated, if you find that the only object was to deal with this property and they are only to deal with that property, although it happens at the moment that all they have to do is to receive the rents for the next 90 years unless they sell the reversion then I think it is more within the spirit of the decision of the Court of Appeal to say that they are carrying on business even if I think that they were not The case is very near the line and of some difficulty, but that is the best conclusion to which I can come, therefore I must give judgment for the Crown here —*Commissioners of Inland Revenue* v *Birmingham Theatre Royal Estate Company, Ltd* [13]

Company—Business of—

Other things equal, it is more difficult to decide in what circumstances the activities of an individual amount to the carrying on of a trade or business than in what circumstances the activities of a company would similarly amount to the carrying of a trade or business So far as a company is concerned, an important piece of evidence is its Memorandum and Articles of Association which set out the objects of the company, whereas in the case of an individual a similar piece of evidence is not ordinarily available A chartered company however (as distinguished from an Incorporated Company) stands on a peculiar footing A chartered company may do any business that is not specifically prohibited by its charter

The distinction between a company and an individual in this respect, *viz*, as to the circumstances in which a particular activity may be a business if conducted by a company whereas if conducted by an individual it would not be a business was set out in *Smith* v *Anderson*[14] (a U K case under Company Law) But this distinction was hardly emphasized—in fact it had been lost sight of—in various cases under the Income tax Acts for quite a long time until it came to prominence in *Commissioners of Inland Revenue* v *Korean Syndicate, Ltd* [15] In that case the Court of Appeal reaffirmed the principles set out in *Smith* v *Anderson* In the *South Behar Railway* case the House of Lords

(13) 12 Tax Cases 580
(14) 15 Ch D 247
(15) (1921) 3 K B 258, 12 Tax Cases 181

(Corporation Profits Tax Case) Commissioners of Inland Revenue v Dale Steamship Company [11]

Rents received by a company—When treated as income from business—

A company was formed in 1899, its objects being, among other things, to acquire and take over the assets and liabilities of the proprietors of the Theatre Royal, Birmingham. The old proprietors were a joint stock company, who were landowners only and did not work the theatre but had merely received the rents. The new company, on the other hand acquired the Theatre Royal and other properties subject to an existing lease. Later on, the theatre was rebuilt. During the several years under appeal the whole of the real estate belonging to the company was let to five tenants under leases, the period of which was in no case less than eighty nine years. The income of the company consisted of the rents payable under the leases and of interest and dividends on investments. The company contended that it did not carry on a 'trade' or 'business'. *Held*, that the company was carrying on a trade or business within the principle laid down by the Court of Appeal in *Commissioners of Inland Revenue v Korean Syndicate Ltd.*

Per Rowlatt J—Now the question arises whether the company was carrying on business. Undoubtedly it was; it was enjoying the turning to account of the property which it was formed among other things to turn to account but the form in which its revenue came in was the comfortable form of simply receiving rents.

What I should like to have known of course was this. If my way of looking at the facts had not been questioned at all would it then have been said that it is quite enough to make a company carry on business if it is simply receiving rents which it had arranged for in the course of turning to account the property it has to turn to account. I very much wish that the Court of Appeal in the *Korean Syndicate Case*[12] could have seen their way to say that if they meant to say it. I do not think Lord Justice Younger meant to say it nor has anybody said as far as I can see that the mere fact that it is a company carrying on something, makes that something a business when it would not have been a business if a private person had been carrying it on. Nobody has gone the length of saying that but it is obvious from what the Master of the Rolls said that when you are considering whether a certain form of enterprise is carrying on business or not it is material to look and see whether it is a company that is doing it. In the present case I think the inclination of my mind on the whole is in favour of the Crown, because it seems to me that looking at what the company were incorporated to do they applied

(11) 12 Tax Cases 712
(12) (1921) 3 K B 258 12 Tax Cases 181

may, by general or special order, declare to be a company for the purposes of this Act ,

History—

The present definition of company was introduced in the 1918 Act The definition in the 1886 Act was "An association carrying on business in British India whose stock or funds is or are divided into shares and transferable whether the company is incorporated or not and whether its principal place of business is situate in India or not "

Companies without shares—

The object of introducing the present definition in 1918 apparently was (1) to confine the definition only to such associations as are incorporated unless they are foreign and (2) to expand the definition so as to include companies other than those doing 'business', but a probably unintended result is that even companies which have no shares—and are limited by guarantee—are 'companies' for the purpose of the Income tax Act The general framework of the Act (see sections 14 and 48) with its provision for refunds clearly contemplates companies with shares but the explicit definition of 'company as 'a company defined in the Indian Companies Act, 1913 ' leaves no option except to construe 'company' as including companies without shares

Company—

The following is the definition given in the Indian Companies Act "A company formed and registered under this Act or an existing company ' It is not intended to summarise here the provisions of the Indian Companies Act but the following important features of the Act may be mentioned

Any seven or more persons may form themselves into a public company, and any two or more persons may form themselves into a private company (section 5) A private company' is defined as one that by its articles restricts the right to transfer its shares, and limits the number of its shareholders (exclusive of its own employees) to fifty and prohibits any invitation to the public to subscribe for its shares or debentures (section 2, sub section 13) Every company, association or partnership formed for the purpose of carrying on business for the acquisition of gain, and consisting of more than twenty persons, must be registered as a company, unless it is formed in pursuance of an Act of Parliament or of the Governor General

in Council, or of a Royal Charter or Letters Patent (section 4, sub section 2), while if the business to be carried on is banking it must be so registered (subject to the same exceptions) if it consists of more than 10 persons (*ibid*, sub section 1)

Either class, public or private, might be limited or un limited in liability, and various obligations are imposed on companies, *e g*, the necessity of filing memoranda and articles of association, the maintenance of proper accounts, the preparation of annual balance sheets and the audit of the balance sheet by a duly appointed auditor and the liability to inspection and audit by Government in certain circumstances Some of these obligations however differ in private and public companies

The rules about incorporation of companies in other parts of the British Empire differ but if a company has been duly incorporated in accordance with the local laws in those parts, it is a company for the purposes of the Income tax Act, no matter what the motives of incorporation were

Foreign business associations—

The object of the last part of the section is to include associations, such as the French Societies Anonymes, which, though incorporate bodies, have many characteristics in common with the companies recognised by Indian law But the Central Board of Revenue can make the declaration only if the association is (1) foreign *i e* not belonging to the British Empire and (2) it carries on business in British India Companies of the other classes mentioned in the earlier part of the definition need not necessarily carry on 'business

Company—How taxed—

A company is assessed to income tax on its profits at the maximum rate and the tax is levied even if the profits are less than Rs 2 000 This is done under the Finance Act The share holder, however, is entitled to relief under section 48 in respect of the dividends received by him The shareholder is not taxed again in respect of the dividends (section 14) The assessment of the company's profits does not depend on the profits distributed It is based on profits as computed under sections 8 to 13 The company is not an agent for the purposes of income tax acting on behalf of the share-holder No share holder has a right to have a dividend declared, and it is only after a dividend has been declared that the dividends become his income [18] The company is assessable *as a company* on its profits It is conceivable that the assessable profits may be *nil* while the company may

(18) *Commissioners of Inland Revenue v Blott 8 Tax Cas 101*

distribute profits from reserves or some other source Nevertheless the shareholder can get refund of income tax under section 48

Company not agent of shareholder—

The position of the company in this respect as already stated is *not* that of principal and agent By a specific section (section 14) the shareholder is absolved from the liability to pay tax again on the dividends that he has received from the company In the long run, of course, the dividends distributed must have paid tax if not in the year of distribution, at least in previous years For a detailed discussion of this question of agency, *see* notes under sections 14 and 48

Super-tax—

As regards Super-tax, companies pay a flat rate of Super-tax on their profits in excess of Rs 50,000 This again is regulated by the Finance Act This tax is in no sense paid on behalf of the shareholder, nor is a refund allowed to the shareholder as in the case of income tax As already stated the Income tax Laws does not recognise any agency on the part of the company on behalf of the shareholder, except to the extent that it has indirectly countenanced such agency in sections 14 and 48 See *Maharajadhiraj of Darbhanga v Commissioner of Income-tax, Bihar and Orissa,*[19] cited under section 14

Company Super-tax and Corporation Profits Tax—

The super tax on companies really corresponds to the Corporation Profits Tax in other countries, but with this difference—the Corporation Profits Tax is allowed elsewhere as a deduction from profits for assessment to income tax whereas the Indian Company super tax is not It will be seen that the share holders in a company are in a worse position than partners in a registered firm The former have to pay an additional super-tax through the company, though in other respects they are more or less in the same position Objection has, therefore, been raised to the tax on the ground that it handicaps joint stock concerns, on the other hand the arguments in favour of the tax are that incorporation as such confers certain advantages which might be legitimately taxed These advantages are —

(1) the possibility of limiting liability,

(2) corporate finance,

(3) freedom of transferring or selling shares,

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(19) 1 I T C 303, 3 Patna 470

(4) publicity, audit, etc

(5) rights of shareholders to enforce liquidation

Company and partnership—Difference between—

The principal points of difference between a partnership and a company are the following —

(a) The individual members of a partnership are collectively entitled to the property of the partnership but the property of the company belongs to the company as such and not to the shareholders—Re *George Newman & Co*[20]

(b) The creditors of a firm can proceed against the property of the partners but the creditor of a company can proceed only against the company as such[21]

(c) Unlike a member of a firm a shareholder cannot dispose of the property of the company or incur liabilities on behalf of the company A shareholder can contract with his company whereas a partner cannot contract with his firm

All these differences flow out of the fundamental principle that a company is a separate person apart from the shareholders while a firm is not a separate person apart from the partners

The distinction between a firm or partnership and a company has also been put in another way A partnership is an arrangement between definite individuals bound together by a contract while a company is so to speak a constantly changing partnership or succession of partnerships[22]

Company—Separate entity—

Upon the issue of the certificate of incorporation a company becomes a body corporate—*see* section 24 of the Indian *Companies Act As already stated it is not like a partnership* or association (leaving aside the Hindu undivided family which is peculiar), a mere collection or aggregation of individuals but a separate legal person entirely distinct from the shareholders—a metaphysical entity (as has been described by Palmer), a fiction of law with no physical existence

'One man' Companies—Not invalid—

The law does not prescribe any minimum shares to be held by a shareholder nor a maximum An 'one man' company therefore is not forbidden by law

The statute enacts nothing as to the extent or degree of interest which may be held by each of the seven or as to the proportion of

(20) (1895) 1 Ch 674
(21) *Flitcroft s case* 21 Ch D 533
(22) *Smith v Anderson*, 15 Ch D 273

interest, or influence, possessed by one or the majority of the shareholders over the others "[23] "It was said in the present case that six shareholders other than the appellant were mere dummies, his nominees and held shares in trust for him. I will assume this was so. In my opinion it makes no difference."[24]

"There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected or that they or any of them should take a substantial interest in the undertaking or that they should have a mind and will of their own as one of the learned judges seemed to think or that there should be anything like a balance of power in the constitution of a company."[25]

The facts of the above case are as below. Salomon, a leather merchant and the owner of a profitable business, converted his business into a private company. He was solvent at the time. Of the shares he took 20,000 and his wife and children a share each. Salomon also received debentures to the amount of £10,000 in part payment by the company for the business. Later on, the company went into liquidation and the validity of these debentures was challenged on the ground that the company was a sham. The Court of first instance held that Salomon was bound to pay the unsecured creditors of the company out of his own pocket even though his shares had been fully paid up. This decision was confirmed by the Court of Appeal but on a slightly different ground, *viz*, the whole scheme was a fraud on the law which required substantial shareholders and not mere dummies. This decision was unanimously reversed by the House of Lords who held that there was not a syllable in the law which required the seven shareholders to be beneficially or substantially interested.

The ordinary reason for which a man forms his business into a company is that he may have the advantage of the trading of the company by holding a greater part of the shares and receiving a greater part of the profits in dividends as they are distributed, while at the same time he need not be personally liable on the contracts which are made to earn the profits. That this is a perfectly legitimate object was decided by the House of Lords in the case of *Salomon* v *Salomon*[26] quoted above.

Incorporation cannot be challenged—

If a certificate of incorporation had been obtained fraudulently, that may be a ground for the persons interested to get the certificate cancelled, but so long as the certificate is in force it is valid as against the world. The income tax authorities can-

(23) Per *L C Halsbury* in *Salomon* v *Salomon & Co* (1897) A C 22
(24) Per *Lord Herschell* *ibid*
(25) Per *Lord Macnaghten* *ibid*
(26) (1897) A C 22

not refuse to recognise as a company a 'company' that has actually been registered under the Indian Companies Act, seeing that the definition of 'company' in section 2, sub section 6 of the Indian Income tax Act begins company means a company as defined in the Indian Companies Act, 1913, *i e*, 'a company formed and registered under' the latter Act (Section 2, sub section 2, Act VII of 1913)

Company—Doing business of other persons—

There may be a position such as that although there is a legal entity within the case of *Salomon v Salomon* [26a] that legal entity may be acting as the agent for another person or it is conceivable that although there be a legal entity that legal entity may really be doing the business of somebody else and not its own business at all [27]

On what profits the company should be taxed is always a question of fact If a company actually does the business of other persons including companies it is for the Income tax Department to determine whether and how far in fact the business of the other persons or companies is done by the company Merely because a company is a properly constituted company under the Indian Companies Act it does not follow that nobody else can be made liable for taxation in respect of the business of that company or *vice versa* It must all depend on the circumstances of each case At the same time a company that has actually been registered under the Companies Act must be recognised by the Income tax Officer as a company He cannot ignore the existence of the company as such It is, however, quite a different matter whether the company should be taxed in respect of its own profits only or also of the profits of the business of some other company or person which in fact it carries on In this connection see *Apthorpe v Peter Schoenhofen Brewing Co*,[28] *St Louis Breweries v Apthorpe*;[29] *United States Brewing Co v Apthorpe*,[30] *Gramophone and Typewriter Co, Ltd v Stanley*,[31] *Commissioners of Inland Revenue v John Sansom*[32] The Income tax Officer can examine the genuineness of one man companies and tax shareholders on the basis of the true nature of transactions, *e g*, when dividends are disguised as loans, the Income tax Officer can tax the shareholder—see In re *Sir D M Petit*[33]

(26 *a*) (1897) A C 22

(27) Per *M R Sterndale* in *Commissioners of Inland Revenue v Sansom* 8 Tax Cases 2?

(28) 4 Tax Cases 41

(29) 4 Tax Cases 111

(30) 4 Tax Cases 17

(31) 5 Tax Cases 3 8

(32) 8 Tax Cases 20

(33) 2 I T C 2??

(6-A) 'Firm', 'partner' and 'partnership' have the same meanings respectively as in the Indian Contract Act 1872

History—

This definition was introduced by Act XXI of 1930 (popularly called "Bogus Companies and Firms" Act) in order to remove doubts which had been suggested—see for example In re *Ambalal Sarabhai*, 1 I T C 234 Generally speaking, however, the expressions 'Firm', 'partner' and 'partnership' as used in the Income tax Act had in fact been construed by Courts with reference to the definitions in the Indian Contract Act

Registered firm—

As to the method of assessing a registered firm, *see* notes under section 2 (14), as regards the procedure for registering a firm, *see* notes under section 26 A

Unregistered firm—

See notes under section 2 (16)

Firm—What is a—

There is no such thing as a firm known to the law[34] though in Scotland, a firm is recognised as a separate entity, *i e*, a different legal person from the partners All the same a 'firm' is recognised in commercial practice as a separate entity apart from its partners, and this Act recognises this See also *ex parte Chippendale*[35]

"It is argued by the Commissioner that a partnership is for income tax purposes an entity, but it is not an entity known to the law, it is not a separate entity like a company limited by shares, its name is merely a convenient method of describing its partners each of whom is jointly and severally liable for its debts and for income tax purposes it is a convenient body to assess, as the partners carry on trade together and keep books in which the partnership transactions are entered and earn together profits or make losses It is to be observed, that for this purpose no distinction can be made between registered and unregistered firms, for whether a firm is a legal entity or not does not depend on registration"[36]

"'Partnership' is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them"

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(34) Ex parte *Corbett* (1880) 14 Ch 1?2

(35) (1853) De G M & G 19 (36)

(36) Per *Schwabe C J*, in *Commissioner of Income tax v M Ar Ar Arunachalam Chetti* 1 I T C 278

"Persons who have entered into partnership with one another are called collectivly a 'firm'"

[Section 239 of the Indian Contract Act IX of 1872]

But persons who have no mutual rights and obligations do not constitute an association because they happen to have a common interest or several interests in something which is to be divided between them[37] That is to say, if the shares are distinct and separately transferable there would only be a co ownership and not a partnership which can only arise if there is a common business and sharing of profits Thus the joint proprietorship in defined shares of a house let to tenants would not be a 'partnership' but if the house was used as a hotel under their own management a partnership would arise in regard to hotel keeping[38] Part owners of a ship are not necessarily partners[39] but if they employ the ship in trade or adventure on joint account they are partners as to that employment and the profit made[40] Even the joint acquisition of property avowedly for purposes of profit does not make the matter necessarily one of partnership[41] Sharing *gross* profits will not result in a partnership[4]

Just as common interest will not in itself create a partnership without a division of profits, so sharing of profits will not unless there is really a common business Although a right to participate in profits is a strong test of partnership there may be cases where upon a simple participation of profits there is a presumption not of law but of fact that there is a partnership yet whether the relation of partnership does or does not exist must depend on the whole contract between the parties, and that circumstance is not conclusive[43]

It is not easy to draw the line between a partnership and a payment of salary by a share of profits[44] Sharing losses is a strong *prima facie* test of partnership[45] But it is even possible for a person both to receive a share of the profits in another man's business and share his losses and yet be only a servant of the other person It would all depend on the terms of the agreement between the two[46]

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(37) *Smith v Anderson* (1880) 15 Ch D 247
(38) *French v Styring* (18[illegible]7) [illegible] C B N S 357
(39) *Helme v Smith* (1837) [illegible] Bing [illegible]
(40) *Crean v Broads* (1847) [illegible] Ha 395
(41) *London Financial Association v Kelk* (1884) [illegible] Ch D 107
(42) *Lyon v Knowles* (1863) 3 B & S 556
(43) *Pooley v Parkyns* (18[illegible]) L R Eq 331 *Cox v Hickman* (18[illegible]0) 8 H L C [illegible] *Mollow March & Co v Court of Wards* (187[illegible]) L R 4 P C 419
(44) *Steel v Lester* (18[illegible]) 3 C P D [illegible]
(45) *Commissioner of Income tax v Paboo Sahib & Sons* [illegible] I T C 50[illegible]
(46) *Walker v Hirsch* (1884) 27 Ch D 460

A selling association which was formed by an agreement between certain ice manufacturing concerns in order to prevent under selling by constituent firms, and which had the entire control over manufacture, sales, etc, and distributed the profits between constituent members, was held to be a 'firm' within the meaning of the Income tax Act; and the fact that the constituent firms made heavy losses because of the controlled prices was held to be irrelevant [47] A similar ruling was given by the Lahore High Court in *Khushiram—Dukhbhanjanram—Tekchand* v. *Commissioner of Income tax* [47 a]

Where one man supplied all the capital and bore all the losses, and he and his attorneys had the control of the business including the power to alter the shares of profits of the other persons and even dismiss them, it was held that the relation was one of master and servants, and not a partnership [48]

The incidents of partnership referred to in Chapter IX of the Indian Contract Act need not subsist in all cases and section 253 of Indian Contract Act expressly provides for arrangements to the contrary

Prohibited partnerships—

Both in England and in India the number of persons who may from an ordinary partnership is limited *See* section 4 of the Indian Companies Act (VII of 1913) Under section 23 of the Indian Contract Act (IX of 1872) the consideration or object of an agreement is unlawful if it defeats the provisions of any law, and the agreement is void Therefore a partnership which is prohibited under the Companies Act will not be recognised as such by the Income tax Officer But he can tax profits from illegal or unlawful transactions *See* notes under Section 4 (3) (vii)

Each partnership to be taxed separately—

Whether a firm is a legal entity or not, the Income-tax Act requires each firm to be taxed separately from the partners—sections 3 and 55, and the partners are either absolved from liability to tax on their share of profits (section 14) or allowed in the case of a registered firm, a refund of tax (section 48) or to set off losses (section 24) So if an individual were a partner in three firms—whether registered or unregistered—there would be four assessments, one on each of the firms and one on the individual, the latter taking into account the shares of his profits

(47) *Lucknow Ice Association* v *Commissioner of Income tax* 2 I T C 156

(47 a) 3 I T C 298

(48) *Mahomed Kasim Fowther* v *Commissioner of Income tax*, 54 M.L.J, 219 (F B)

in the three firms and the tax paid by the firms on these profits, leaving aside, of course, the assessments on the other partners

Firm—Residence of—

The 'residence' of a firm is determined by the same considerations as the residence of a company, *i e*, largely by the seat of the directing power behind the business and not by the physical residence of the individual partners *See* notes under section 4 (2) and *T S. Firm* v *Commissioner of Income-tax*[49]

Notices on firms—Service of—

As to the service of notice on a firm, *see* section 63 (2).

Returns of firms—

As to returns to be submitted by firms, *see* section 22 (2) Unlike a company which has to send in a return without any notice, the firm like an individual need send in a return only after service of notice by the Income tax Officer

Discontinuance of business by firms—

See section 25

Firm—Constitution of—Change in—

See section 26

Partnership of Wife and Husband—

In In re *Ambalal Sarabhai*[50] it was held that a partnership between husband and wife in which the husband was almost every thing in the concern—having the sole control of the management, the power of determining the partnership and of admitting new partners—was considered to be a valid partnership Per *Shah*, *C J*—"There is nothing in the document to exclude the idea of combining her property, labour or skill in the business of the firm Indeed the papers sent up with the reference tend to show that she did agree to render herself liable to the Bank as a partner of this firm along with her husband That involves the idea of contributing property to the business of the firm .. When the parties agree to become partners it is not necessary to state in terms that they agree to combine property, labour or skill That may be implied and in the present case I see nothing to exclude the idea of combining property, labour or skill when and so far as necessary between the partners The fact that the control is kept with Mr Ambalal and that he has certain extra rights as a major partner does not in any sense negative a partnership according to law It is open to two partners to agree, on the lines on which they have agreed in this case, to allow the business of the partnership to be conducted by one of the partners"

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(49) 50 Mad 874, 2 I T C 320
(50) 1 I T C 234

In this judgment there are passages to the effect that if the Income tax Officer had found the partnership to be bogus in fact, he could have ignored it

"This reference has been made on the footing that the document evidences a real transaction between the parties The *learned Advocate General has not suggested, and I do not think* that on this reference it could be suggested, that the document does not evidence a real transaction between the parties to the document But he contends that the question of law that arises is whether on a proper construction of this document the two persons are constituted partners in law"

Bogus firms—

It is submitted that it is open to the Income tax Officer to refuse to recognise a firm if he has reason to think that the instrument of partnership is not genuine That is to say there should be a firm before the Income tax Officer can register it, and the mere existence of an instrument of partnership will not in itself bring a partnership into existence if there is really no partnership[1] On a question of fact the finding could not be questioned by the High Court so long as there is evidence to permit of such finding See *Commissioners of Inland Revenue v Sansom (C of A)*[2], *Jacobs v Commissioners of Inland Revenue (C S)*[3], *Commissioners of Inland Revenue v Whitmore (K B D)*[4], *Sir Dinshaw Petit v Commissioner of Income tax*[5] in all of which cases of 'one man' companies it has been held that the Income tax Officer can go behind the documents and accounts if the facts and circumstances of the case justify his doing so See also *Hawker v Compton*[6] in which the Commissioners held that no partnership existed and *Morden Rigg & Co, etc v Monks*[7] in which the Commissioners held that a partnership existed In all these cases the Courts declined to interfere on the ground that the findings were of fact It is clear that in the absence *of an instrument of partnership the onus falls on the assessee* of proving the existence of a partnership

"You do not constitute or create or prove a partnership by saying that there is one The only proof that a partnership exists is proof of the relations of agency and of community in losses and profits and of the sharing in one form or another of

(1) *Dickinson v Gross* 6 A T C 551 In re *Bisweswarlal Brijlal* (Calcutta)
(2) 8 Tax Cases 20
(3) 4 A T C 543 10 Tax Cases 1
(4) 5 A T C 1
(5) 2 I T C 55
(6) 8 Tax Cases 306
(7) 8 Tax Cases 450

the capital of the concern " Per *L P Clyde* in *C. I R* v. *Williamson*,[8] in which there was no deed of partnership Father and sons leased a farm jointly The father supplied capital, controlled the bank account which stood in his name and also purchases and sales He gave moneys to the sons from time to time—not regular shares No account was kept of the farm The business was claimed to be a partnership at will, which the Commissioners accepted The Court of Session held that there was no evidence to justify that there was a partnership

In the case of an unregistered firm, which the Income tax Officer finds to be not genuine, that is, if the Income tax Officer finds that there is no firm in existence in fact but only in name, it would apparently be open to the Income tax Officer to ignore the firm and treat the profits of the firm as the profits of the real proprietor of the firm That is to say, in ascertaining the 'total income' of the partners, the Income tax Officer will go by the real interests of the partners and not the alleged interests

Unregistered firms formed or used to evade tax—

Even if a firm is not bogus, if it is under the control of one partner, and is formed or used with the intention of evading or reducing tax on the partners the Income tax Officer can ignore the firm and tax the partners directly on their shares See section 23 A

Non distribution of profits—

Notwithstanding the fact that the assessees, three brothers who lived and messed together, kept no accounts, no separate ledgers and did not draw on the profits more than to a limited extent for their maintenance, it was held in *Commissioner of Income tax Central Provinces and Berar* v *Kekabhai and others*[8 a] that the assessees were entitled to be registered as a firm It is not a necessary condition of partnership under section 239 of the Contract Act that the profits should be divided at a particular time, nor does the certificate in the application under the Income-tax Rules require the profits to be divided within a particular limit of time If a firm is a firm under the Contract Act and if the certificate is given in good faith, the Commissioner of Income tax should register the firm

See however, section 28 (2) as amended by Act XXI of 1930 which gives power to the Income tax Officer to levy a penalty if the profits of a registered firm have been distributed otherwise than in accordance with the instrument of partnership registered under the Act before the Income tax Officer as governing the distribution

(8) 14 Tax Cases 335
(8-a) 1930 A I R Nag 6

Actual division of profits in accounting year, whether necessary—

Whether profits are actually divided during the accounting year between the partners or not, the profits are taxable under the law. Each partner will be presumed to have received his share of the profits irrespective of the fact that he has actually received it or not, and taxed accordingly. That he has actually allowed the profits to remain in the business does not affect his liability nor will his foregoing a refund of income-tax under section 48 affect the liability. The income has accrued or arisen to him and is ready to be received by him and is therefore liable under sections 3 and 4 of the Act. That he prefers not to receive it does not absolve his liability. Besides, in applying for registration, the partners have to certify under Rule 3 that each partner has received or will receive his share of the profits, and the partners are prevented from claiming any advantage on the ground that they have not actually distributed the profits. The English Law is more explicit on this subject (proviso to section 20, Income-tax Act, 1918); *see also* per Horridge, J., in *Gaunt* v. *Inland Revenue*[9] and Rowlatt, J., in *Blott* v. *Inland Revenue*.[10]

Super-tax—Evasion of—Provisions against—Non-distribution of profits—

See section 23-A.

(7) "Income-tax Officer" means a person appointed to be an Income-tax Officer under section 5.

See notes under section 5.

(8) "Magistrate" means a Presidency Magistrate or a Magistrate of the first class, or a Magistrate of the second class specially empowered by the Local Government to try offences against this Act.

Magistrate—

The words "specially empowered by the Local Government to try offences against this Act" were introduced in 1918, in response to non-official opinion. As the Income-tax Act came to be applied with greater strictness it was desired that offences should not be tried by magistrates of insufficient experience or standing.

(9) "Person" includes a Hindu undivided family.

(9) 3 K.B 395 (1913).
(10) 8 Tax Cases, on page 111.

Person—

In the 1886 Act 'person' was defined as including a firm and a Hindu undivided family. The definition was given up in the 1918 Act as being covered by the definition in the General Clauses Act. Nor did the Bill as introduced in 1922 contain a definition. The Select Committee added the present definition so as to make the position clear though it was not necessary. See also the notes under "Assessee". As to a Hindu undivided family see below. As to whether a person includes an 'infant' see notes under section 40—*R.* v. *Newmarket Commissioners (exp. Huxley)*.[11-12]

Hindu Undivided Family—

For the purposes of the income-tax law it is only necessary to consider what constitutes a Hindu undivided family and what kind of property and income belong to such a family as distinguished from its individual members. No definition of a Hindu undivided family has been attempted in the Act nor is a simple definition possible. The law on the subject is governed by various sacred books of the Hindus, commentaries on and digests of these books, by custom and by rulings of Civil Courts, including of course the Judicial Committee of the Privy Council. The essential feature about a Hindu undivided family is that it is a co-parcenary or tenancy in common, but such co-parcenary or tenancy arises by law among certain relatives of stated degrees including relations by adoption and cannot be created by voluntary contract among strangers or relatives not of the stated degree.

Non-Hindus—

Jains are apparently Hindus for the purpose of the income-tax law; the position of Moslems who follow Hindu Law, *e.g.*, Khojas is doubtful.

Family—Unit for income-tax—

The important point is that the Hindu undivided family is regarded as a single unit for income-tax purposes, being represented by its manager with whom alone the income-tax authorities are concerned in assessing the income of the family.

Schools of Hindu Law—

Broadly speaking there are two schools of Hindu law: the Dayabhaga and the Mitakshara—the former prevailing in the greater part of Bengal and the latter in the rest of India. Under the former system the father of a family is the absolute master of the family property, subject however to the liability of maintaining the sons, etc., and his position is practically that of an

(11-12) 7 Tax Cases 49.

individual not belonging to a Hindu undivided family. The younger members of the family have no right either to partition the property or, what follows, to alienate it All that the sons receive is maintenance For the purpose of income tax these younger members who so receive maintenance from the father should be treated as receiving such maintenance *qua* members of a Hindu undivided family That is, the tax cannot be levied once from the father and again from the sons The sons have no claim to definite shares or amounts on account of maintenance, and the amounts paid on account of or spent on such maintenance cannot be deducted from the income of the father before he is taxed It is not the father personally that the law attempts to tax but the family as a whole

If the father of a Dayabhaga family dies and the sons partition the estate, the position is, of course, clear—each sharer is to be treated as an individual not belonging to the Hindu undivided family On the other hand the sons or heirs may decide not to partition the estate but to enjoy it in common In such a case even though the shares of the members under the Dayabhaga law are clearly defined, as the law stands, the different persons should, apparently, be treated as individuals belonging to a Hindu undivided family, *i e*, the income received from the joint estate should not be added on to the other income of the individuals for the purpose of income tax

It is not, however, in Dayabhaga families that the Hindu undivided family presents so difficult problems for the Income tax Officer Under the Mitakshara law which prevails in by far the greater part of India, every male member of the family gets a right in the family property as soon as he is born The position of the managing member of the family, who is usually the eldest male member, is very much like that of a trustee in relation to his *cestui que trust* The family which may conceivably include several generations, but in practice seldom exceeds two or three, should be treated as one unit for the purpose of income tax unless it is partitioned

As stated by Mayne (Hindu Law, 9th Edition, paragraph 269) a Hindu joint family includes not only those members who form a co parcenary in the sense that they can claim partition of the joint family property but also those members who are merely entitled to maintenance At one period, a step mother was entitled, under Hindu Law, to claim a share of the joint family property at partition (Mayne's Hindu Law, paragraphs 477 and 479 (2) and Gour's Hindu Code, page 696, paragraph 1553) In some provinces, a step mother can still claim such a share [13] Though

(13) I L R 38 All 83

this right is not now recognised in all provinces it has been held even where that right is not recognised that her claim to maintenance is in lieu of her former right to a share[14] There is no obligation however on a step son to support a step mother independently of the existence in his hands of family property[15]

Whether the actual facts of to day correspond to the law or not, the law assumes that the normal status of a Hindu undivided family is one of jointness in residence and estate The presumption in law, therefore, is that a Hindu family is undivided and it is for the person claiming any advantage for the purpose of tax to prove the contrary The law also presumes that property once joint continues as such until the contrary is proved Other presumptions are that property acquired by or in possession of a joint member is joint property, and that the property acquired with the nucleus of joint property is joint unless the acquirer has been separated from the family All these presumptions, however, apply only in the case of male members of the family If the property belongs to a female member the position is different as will be seen in what follows about 'stridhanam'

A partition can be effected in several ways by decree of a Court, by a Deed of Partition (which under the Registration Act must be registered if it involves immovable property over Rs 100 in value) by a Deed of Release from a member relinquishing his right to the joint property, by an agreement—oral or, written—among the members to remain separate or even a formal declaration by one member that he will remain separate, by actually remaining separate for 12 years and by the conversion of a member to an alien faith

The family may be partitioned but not the properties, which may be managed and shared in common The important thing is the status of the family and not whether actually the property has been divided or not At the same time a family cannot be joint if the property has been divided Even if the property remains joint, if the family is divided in status the acquisition of the members is individual and not joint property It is also open to a family to arrange to enjoy a portion of the family property jointly but in specific shares and the arrangement at once becomes a voluntary contract outside Hindu law and is no longer subject to the incidents of Hindu family coparcenership There is also nothing to prevent a member of a Hindu undivided family from earning on his own account without putting the earnings into the common stock but once he puts

(14) I L.R 38 Mad 153
(15) I L.R 9 Bom 2 9

it into the common stock it becomes the family property and not his own

Extract from the Calcutta High Court judgment, in the case of *Ganga Sagar Anandamohan Shaha v C I T, Bengal*[15 a]

"Now, every Hindu family is presumed to be joint in food worship and estate Under the Dayabhaga law each co parcener takes a defined share The essence of a co parcenary under the Mitakshara Law is unity of *ownership* whereas under the Dayabhaga law the essence of a co parcenary is unity in *possession* So long as there is unity of *possession*, no co parcener can say that a *particular* share of the property belongs to him That he can say only after a partition Partition then, according to the Dayabhaga law, consists in splitting up joint possession and assigning specific portions of the property to the several co parceners But there is no presumption that a family, because it is joint, possesses joint property or any property where there is joint estate and the members of the family become separate in estate the family ceases to be joint Mere severance in food and worship does not operate as a separation Cessar in commensality is an element which may properly be considered in determining the question whether there has been a partition but it is not conclusive[16]. If, however, after Cessar in commensality any member of the family is in possession of any portion of the property separately, the presumption referred to above is considerably weakened No doubt it is true that the mere fact that a property is purchased in the name of a member of the family and that there are receipts in his name respecting it, does not render the property by itself his separate property, but if in addition to the fact that certain property stands in the name of one of the members there be these further facts namely that some other members of the family have properties standing in their separate names and are found to deal with the same as their own without reference to the rest of the family and that the members of the family are allowed to appear to the world to be the sole owners of the said separate properties the presumption that the properties are joint is almost gone and the burden of proving that the properties are still joint will lie on those who allege that they are joint If the family remains joint no charge can be made against any co parcener because in consequence of his having a larger family to maintain than others, a larger share of the joint income was spent on his family Such expenditure is considered to be the legitimate expenditure of the whole family If however the expenses of the marriages of the daughters and of the education of the children are paid for separately by the co parceners that is a circumstance which must be taken into consideration for the purpose of finding out whether the family still remained joint"[17]

Partition—Questions of fact and law—

It will be seen from the foregoing that the law merely lays down various presumptions which, of course, can always be re-

(15 a) 3 I T C 1
(16) L R 31 I A 10, I L R 31 Mad 482
(17) 5 B.L.R 347

to prevent such a family having income under salaries, interest and securities, property or professional earnings, yet in practice these categories of income are not likely to be as important as income from business, especially if the family is in affluent circumstances The law regarding these families is slightly different from that regarding non trading families If the family carries on an ancestral trade or with the consent of all its members a new trade, it is governed not by the ordinary Hindu law, but by such law as modified by the exigencies and usages of the trade The partnership is not dissolved by the death of any of the members No partner can, even when severing his connection with the family, demand accounts of profits and losses Any member, not necessarily the senior male member, can be the manager of the business and as such can pledge the credit and assets of the family without being accountable for losses or gains But a partnership based on only some of the members of the family, whether with outsiders or among themselves, is not a business of the family Even if a business is carried on by all the members of the family, if the profits are divided upon some agreed proportion, the trade is not that of the family but that of an ordinary firm under the ordinary law of partnership.

A Hindu undivided family, originally joint in mess and worship, carried on an ancestral business There was no capital account in the name of the family as a whole but separate capital accounts as well as personal accounts in the names of the individual members The profits were not distributed equally between the members but in the ratio of 5 to 3 The profits were enjoyed by each person separately *Held*, that the persons constituted an unregistered firm and not a Hindu undivided family for the purpose of assessment to income tax—*Harsingh Santokchand v Commissioner of Income tax* [1]

Whether a business carried on by a member of a Hindu undivided family in partnership with outsiders is the family business or not is a question of fact In a case in which (1) the business with strangers was started when the member was an infant, (2) he had no property at any time apart from his share in the family property and (3) he was still a student and conducted no business of his own, the High Court considered that there was evidence for the Income tax Officer's finding that the business belonged to the family *Devkinandan & Sons v. Commissioner of Income tax, Delhi*

Basis of taxation—

So far we have considered what is a Hindu undivided family and what should be reckoned as its joint property. We

(21) 2 I T C 41

may now consider how the Indian Income tax law, i e, the Income tax and Finance Acts together, deals with the Hindu undivided family as compared with other assessees As regards income tax it is treated just like an individual or an unregistered firm, i e, it pays a graduated rate of income tax varying with its total income As regards super tax, the first Rs 75,000 of its income is exempt from taxation as against the first Rs 50,000 in the case of individuals and unregistered firms In neither case can a member of the Hindu undivided family in his individual capacity be called upon to pay any tax on his share of the income—section 14—or be made to pay a higher rate by including this share in his total income Nor can he claim, on the other hand, a refund of tax under section 48 on the ground that his own total income, including his share of the family income, entitles him to a lower rate of taxation than the family The result, as will be seen, is that the members of a relatively poor or moderately wealthy Hindu undivided family have sometimes to face higher taxation than they would if they were separate, while the members of a very wealthy or affluent family may occasionally stand in a better position than if they were separate

Impartible estate—Whether joint family—

The Finance Act contemplates the larger deduction for purposes of super tax only if the income is that of a joint family in which all the members are jointly interested and not in the case of an impartible estate in which the income is the property of the holder for the time being If the estate is impartible, the other members have no rights of co parcenership and all that they have is a right of succession by survivorship They cannot demand a partition or restrain alienation The income of the estate is the income of the incumbent for the time being, and the fact that he is bound to maintain the sons does not make the income that of a joint family [22]

Effect of registration on joint family firm—

The registration of some members of a Hindu undivided family as a firm under section 2 (16) precludes the assessment of the Hindu undivided family as such to super tax on the income derived from the business of the firm unless the firm so registered has been shown to carry on its business on behalf of and for the benefit of the family But the mere constitution of a partnership between some members of the family by a formal document does not preclude the assessment of the income of the partnership to

(22) *Pajth Shiva Prasad Singh v Secretary of State*, 1 I T C. 384

super tax as part of the income of the family if the partnership is conducted on behalf of and for the benefit of the family "[23]

History—

Under the 1886 Act, 'any income which a person enjoys as a member of a Hindu undivided family when the family is liable to tax' was exempt, *i e*, the position was the same as now The share of the income of the individual member was ignored in assessing him—both as to liability and as to rate Under the Act of 1918, however, a Hindu undivided family was treated differently While the family as such was treated as a separate assessee, the amount which an individual member received from the family was taken into account in determining the *rate* at which he should pay income tax on his other income This arrangement, however, was abandoned in 1922 Before 1922 no rebate of income tax was allowed to a Hindu undivided family on account of premia of Life Assurance Policies on the life of the members, but under the present Act such rebates are allowed to the extent of one sixth of the family income in respect of insurance on the life of any male member of the family or of the wife of any such member

(10) ' prescribed means prescribed by rules made under this Act

'Prescribed'—See section 59 as to who can make rules and under what conditions For facility of reference, the rule or rules framed with reference to each section have been given under the section concerned, as well as in one place together after the bare text of the Act

Till 1930, all the rules were made by the Central Board of Revenue, from that year some of the rules under Chapter *IX A (relief to certain classes of provident funds) are made by* the Governor General in Council

(11) ' Previous year means—

(*a*) the twelve months ending on the 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st day of March, then at the option of the assessee the year ending on the day to which his accounts have so been made up

(23) *Chief Commissioner of Income tax Madras v Doraiswami Aiyangar and others,* 1 I T C 214, 46 Mad 673

Provided that, if this option has once been exercised by the assessee, it shall not again be exercised so as to vary the meaning of the expression "previous year" as then applicable to such assessee except with the consent of the Income-tax Officer and upon such conditions as he may think fit, or

(*b*) in the case of any person, business or company or class of person, business or company, such period as may be determined by the [Central Board of Revenue][24] or by such authority as the Board may authorise in this behalf

History—

There was no definition of 'previous year' in the Act of 1886 But section 11 of that Act provided in respect of Joint Stock Companies that the principal officer shall submit accounts of profits made "during the year ending on the day on which the Company's accounts have been last made up or if the Company's accounts have not been made up within the year ending on the thirty first day of March immediately preceding that for which the assessment is to be made then of the net profits so made during the year ending on the said thirty first day of March" There was a similar provision in respect of "other sources of income" also The definition in the 1918 Act was the same as clause (*a*) of the present definition Clause (*b*) was introduced in order to cover exceptional cases in which a commercial community (1) follows a year which is slightly over or under 12 months and (2) follows a year which ends a few days or weeks after the financial year *See paragraph 14 of the Report of the* All India Committee of 1921 (Appendix)

Object of proviso—

The proviso in clause (*a*) of the definition is intended to safeguard the interests of revenue The discretion of the Income tax Officer is absolute, and it is open to him to impose any conditions that he may think fit And so long as his action is not *mala fide* or inherently unjust, the intervention of the Civil Courts cannot be invoked The Income tax Manual says —

'The convenience of an assessee in this matter should be studied as far as possible as it is desirable that the accounting period for income

(24) These words were substituted for the words 'Board of Inland Revenue' by Act IV of 1924

tax purposes should be the same as the accounting period according to which an assessee makes up his accounts for the purpose of his business but in the actual year of change conditions should be laid down sufficient to secure that the substitution of one year for another shall not result *in any profits of an assessee escaping assessment*

Clause (*b*)—Delegation under—

The Central Board of Revenue has authorised Commissioners of Income tax to recognise as the 'previous year' any commercial year in usage which is not less than 11 calendar months nor more than 13 months and also a year which does not terminate later than 30th April If these conditions are not satisfied the sanction of the Central Board of Revenue is necessary The Central Board of Revenue can authorise any period in reason as 'the previous year'[75]

Neither the Commissioners nor the Central Board of Revenue can refuse without adequate grounds to exercise this discretion—see *Julius v Oxford*[76] and other cases cited in the introduction

In the absence of orders by the Commissioner of Income tax or Central Board of Revenue the Income tax Officer is bound by clause (*a*) of the definition *i e* must adhere to a year of 12 calendar months terminating on some day in the previous financial year

First occasion of assessment—

It is not necessary that on the first occasion on which a person is taxable the 'previous year' should consist of at least 12 months *i e* a firm commencing business on 1st June 1924 and closing accounts on 31st March can be taxed in 1925 26 on its profits during the 9 months ended 31st March 1925 There is nothing in the Act requiring the assessee to have been in existence *during the 12 months throughout the 'previous year'*[77]

Clause (a)—

The option to adopt a year not ending on 31st March can be exercised only if the accounts have been made up during the course of the previous financial year Otherwise the 'previous year' is the year ending on the 31st of March

Succession—

Where there is a succession under section 26 and the successor is a separate legal entity from the predecessor, the former is entitled to exercise the option allowed by this sub

(75) *Vanalchand Fatelchand v Commissioner of Income tax* 2 I T C 167
(76) (1880) 5 App Cas 214
(77) *Vanalchand Fatehchand v Commissioner of Income tax* 2 I T C 167

section once It is presumably not open to the Crown to contend that the successor takes over all the rights and liabilities of the predecessor In this connection, *see* notes under section 26

Different businesses—

If an assessee follows different accounting periods for different parts of his business or professions, evidently the income of each part should be made up according to the accounting period actually followed in respect of each part and the incomes added up together Each of these different periods must satisfy the definition of 'previous year' with reference to the financial year of assessment It cannot be said, merely because different accounting periods are adopted in different businesses of the assessee, that no method of accounting has been reguarly employed by the assessee within the meaning of section 13 That section can be applied only when the basis of accounting has been irregular

Temporary change in accounting period—

If an assessee alters his accounting period even temporarily, the consent of the Income tax Officer is necessary

Firm—Change in constitution of—

Under section 2 (2) an assessee means a person by whom income tax is payable, and sections 3 and 55 contemplate firms being assessees The question therefore arises whether when there is a change in the constitution of a partnership, the partnership as newly constituted is a new assessee The mere change *in the constitution of a partnership will not in itself make* the new partnership a separate assessee from the old partnership It would depend on the terms of each partnership whether a change in constitution involves the dissolution of partnership and the formation of another or not Under section 253 of the Indian Contract Act, in the absence of any contract to the contrary the relations of partners to each other are determined by the following rules "(7) if from any cause whatsoever any member of a partnership ceases to be so *the partnership is dissolved as between all the other members* (10) Partnerships whether entered into for a fixed time or not are dissolved by the death of any partner" If a partnership is dissolved and a new partnership takes its place, the new partnership is clearly a separate assessee from the old partnership If, on the other hand, a change in the constitution takes place without necessarily involving a dissolution of the partnership, the partnership as newly constituted is not a separate assessee from the previous partnership

(12) "principal officer, used with reference to a local authority or a company or any other public body or *any* association means—

(*a*) the secretary, treasurer, manager or agent of the authority, company body or association or

(*b*) any person connected with the authority, company body or association upon whom the Income tax Officer has served a notice of his intention of treating him as the principal officer thereof,

History—

This definition has been practically the same since 1886

The word 'any' after 'public body or' was inserted by the Income tax Amendment Act XI of 1924 Otherwise the adjective 'public would qualify association

Practice—

Income tax Officers should treat as the principal officer in the first instance the officials specified in clause (*a*) it is only in cases where the Income tax Officer has no information regarding the persons who discharge the functions of the officers mentioned in clause (*a*) or where such persons cannot be found that he should use the powers conferred by clause (*b*) of treating as the principal officer any other person connected with the company etc (*Income tax Manual*)

'Local authority'—For definition, *see* notes under section 1

Connected with ' is very vague and might include almost anybody If the question of imposing any penalty on the person arose a Court would probably whittle down the meaning of the words "connected with" so as to cover only responsible officers of the company

Notice—

No form has been prescribed for this notice but the service of a notice is obligatory

Though there is no express provision as, for example, in section 43, giving the person served with notice an opportunity of being heard by the Income tax Officer, it is evidently incumbent on the latter to hear the objections of the person if the latter has any before deciding finally to treat him as 'principal officer'

(13) ' public servant ' has the same meaning as in the Indian Penal Code ,

Public Servant—This definition was introduced by the Select Committee in 1922 in order to make it clear that the expression includes all income tax employees and is not restricted to the particular authorities mentioned in clause 5 (4) The words 'public servant' according to the Indian Penal Code denote a person falling under any of the descriptions hereinafter following, namely —

Ninth—Every officer whose duty it is as such officer to take receive keep or expend any property on behalf of Government to make any survey assessment or contract on behalf of Government or to execute any revenue process or to investigate or to report on any matter affecting the pecuniary interest of Government or to make authenticate or keep any document relating to the pecuniary interests of Government or to prevent the infraction of any law for the protection of the pecuniary interests of Government and every officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty

Tenth—Every officer whose duty it is as such officer to take receive keep or expend any property to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village town or district or to make authenticate or keep any document for the ascertaining of the rights of the people of any village town or district

Explanation 1—Persons falling under any of the above descriptions are public servants whether appointed by the Government or not

Explanation 2—Wherever the words 'public servant' occur they shall be understood of every person who is in actual possession of the situation of a public servant whatever legal defect there may be in his right to hold that situation

(14) " registered firm means a firm registered under the provisions of section 26-A

History—

The present definition dates from April 1930 (Act XXI of 1930) There was no provision in the 1886 Act for registering firms *i e* no distinction was made between different kinds of firms There was no definition of the expression in the 1918 Act also as originally passed Section 14 thereof however had a proviso as follows "*Provided that where the assessee is a* company or firm constituted under a registered instrument of partnership specifying the individual shares of the partners the income tax shall be levied at the maximum rate" and section 37 provided for refunds to the partners of such firms if their individual incomes justified such refunds Later on however the Act was amended and a definition introduced as follows —"registered firm" means a firm constituted under an instrument of partnership specifying the individual shares of

the partners of which the prescribed particulars have been registered with the Collector in the prescribed manner This definition continued till April 1930, the words "Income tax Officer" replacing "Collector" in 1922 It was proposed in 1922 to abandon the distinction between registered and unregistered firms and that all firms should be taxed at the maximum rate, it being left to the Income tax Officer to determine whether there was in fact a partnership or not The Joint Select Committee, however, preferred to retain the distinction which still continues The point of the Select Committee was that the taxation at the maximum rate and subsequent refund would inflict hardship on the smaller assessees *The option to register, being one sided,* furnishes an incentive to persons to evade tax, and a check has been provided against such evasion by Section 23 A which empowers the Income tax Officer in certain cases to ignore the firm and tax the partners

Registered firm—How taxed—Comparison with unregistered firm—

The position of a registered firm at present is as below First as regards income tax Income tax is levied on the firm—as on a company—at the maximum rate even though the income is less than Rs 2,000 *This is regulated by the Finance Act* and not by the Income tax Act *The partners get refunds, if eligible,* under section 48 (2) and their share of the profits is included in their 'total income' [section 16 (1)] An unregistered firm, on the other hand, is assessed like *an individual, i e, on a graduated scale depending on the income of the firm* *This again* is regulated by the Finance Act The partners are not entitled to refunds, nor are they taxed on the profits from the firm unless the firm is not taxed, but their shares in the profits of the unregistered firm are *taken into account* in their 'total income' for fixing the rate at which they should pay tax on their other income [section 16 (1)] —*See* notes thereunder

It an unregistered firm as such pays no tax on the ground that its income is below Rs 2,000, the partners are liable to pay tax on their respective *shares along* with the tax on their other income [section 14 (2) (*b*)] *See* notes thereunder

Next as regards super tax *A registered firm as such is not liable to super tax* The share of each partner is added on to his other income, *and he is then individually* assessed to super-tax An unregistered firm, on the other hand, is taxed just like an individual and super tax *is not payable* on the shares of the profits received by partners, unless the firm was not assessed to super tax (*proviso to section 55*)

Set off—Partners—Income of—

As regards the set off of profits against losses of partners in firms—whether registered or unregistered—*see* section 24 and notes thereunder

Registered firms—Advantages of—

It will be seen that there are considerable advantages in registering a partnership with the Income tax Officer unless the firm is petty The partners are ordinarily not only better off than those in unregistered firms, but also better off than the share holders in a company In the latter, while shareholders are entitled to refunds in respect of income tax paid by the company it has been held that the super tax paid by the company is not paid on behalf of the shareholder and that the latter is not there fore entitled to a refund [28]

English Law—

In England no distinction is made between registered and unregistered firms Otherwise the law is, in its essential features, the same, and partnerships are treated very much like registered firms in India, but the details of procedure differ, *e g*, as to which partner is liable to make a return, etc No partnership is liable to super tax in England, that tax being levied on individuals only See sections 4, 14 (3), (*c*) and 20 and Rule 10 Cases I and II of Schedule D of the English Income tax Act of 1918

Rules—

As regards the rules regulating the procedure in connection with registration *See* section 26 A and rules thereunder

(15) ' total income " means total amount of income pofits and gains from all sources to which this Act applies computed in the manner laid down in section 16 ,

History—

There was no definition of 'total income' in the Act of 1886 In fact the concept itself was hardly relevant to that Act with its four separate schedules, each charged by itself, and with hardly any graduation in the tax The definition was first introduced in 1918, but the words "computed in the manner laid down in section 16" were introduced in 1922 in order to remove possible ambiguity

Total income—Significance of—

The expression 'total income' occurs in sections 3, 15 (3), 17, 22 (1) and (2), 23 (1) and (3), 25 A, 48,

(28) *Maharajadhiraj of Dharbhanga v Commissioner of Income tax*, 1 I T C. 303

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If an unregistered firm as such pays no tax on the ground that its income is below Rs 2,000, the partners are liable to pay tax on their respective shares along with the tax on their other income [section 14 (2) (*b*)] *See* notes thereunder

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55, 56, 58-E, 58 G and 58 J The general plan of the law is that except where it is definitely intended otherwise either as a matter of policy, *e g*, in the case of the company super tax or the tax on a Hindu undivided family, or as a matter of administrative convenience, *e g*, the taxation of unregistered firms, the tax is a tax on individuals with reference to their total income which determines their ability to pay But it is administratively convenient to tax as much at source as possible and at the maximum rate, *i e*, before the assessee's personal income has been ascertained This, however, does not dispense with the necessity of determining the individual's liability with reference to his ability to pay, *i e*, 'total income' The only item that does not enter into 'total income' of the individual is his share of income of a Hindu undivided family which has already been taxed Generally speaking, the 'total income' determines the *rate* of tax as well as the exemptions on account of life insurance, etc For a more accurate statement of the position *see* section 16

Special definitions—

Note that 'total income' has been defined differently for the purpose of section 48, and also in the Finance Act—*see* notes thereunder

(16) " unregistered firm means a firm which is not a registered firm

See notes under registered firm—section 2 (14), where the difference between a registered and an unregistered firm has been brought out

CHAPTER I

CHARGE OF INCOME-TAX.

Charge of income tax

3 Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every *individual, Hindu undivided family, company, firm and other association of individuals*

History—

This section became necessary only in 1922 when it was decided to make the Income tax Act a mere Act of machinery and

procedure, leaving the actual charge of tax to be made by Annual Finance Acts In the Bill as originally drafted this put in as sub-clause (3) of section 16 but the Joint Select C mittee transferred it to its present place as being more ap priate

The words "and other association of individuals" v inserted by the Amendment Act XI of 1924

Charged—

This word is not used in the sense of real property la in section 9 (1) (iv) All that it means is that the tax 'is paya or that the assessee is commanded to pay the tax—see *Di Spanish Telegraph Co v Shepherd*[29] and *Kensington Income Commissioners v Aramayo*[30] The United Kingdom law, howe uses, generally speaking, a more unsatisfactory terminology t the Indian law and words like 'assess', charge are used in v ing senses, and the English decisions are therefore not of m help

As regards the meaning of the words 'Hindu undivi family', Company, 'Firm see section 2 and the notes thereun In other contexts in other Acts, the word 'individual' may incl Corporations, etc, but here it refers only to a single person

As regards the question whether a foreign State can under any of these categories of persons mentioned here Introduction

For the definition of total income see sections 2 (15) 16, for previous year see section 2 (11)

'Applicable to the total income—

The slight distinction between the wording of section and that of this section is due to the fact that super tax is lev on the slab system while the rate of income-tax is determi with reference to the total income Under the 'slab syst there is no single rate or rates ' applicable to the total incom there are different rates applicable to different "slabs'

'In respect of' means really 'on' See per the Master Rolls in *Kennard Davis v Commissioners of Inland Revenue*[31]

Deemed to be income—

See sections 18 (4) (Tax collected at source), 58-E (. nual accretion in recognised provident funds), and 58-J (3) (n exempt part of transferred balances in the above funds), a notes under s 4 (2) as regards "constructive remittances" a under s 13 as regards method of accounting

(29) 13 Q B D 202.
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(29) 13 Q B D 202
(30) (1916) 1 A C 215
(31) 8 Tax Cases 341

See also notes under Sections 4 (2), 7 (2), 11 (3) and 42 (1), as to income deemed to accrue, arise or be received in British India

Computation of income—

As to how income should be computed *see* sections 7 to 13 'Income' as understood in the popular or business sense has to be subjected to various additions or deductions before it can be taxed

HOW EACH CLASS OF ASSESSEES IS TAXED

Hindu undivided family—

As to how a Hindu undivided family is taxed *see* notes under section 2 (9), section 14 and the schedules to the Finance Act

Company—

As to how a company is taxed *see* notes 2 (6), 14 and the *schedules to the Finance Act*

As regards relief to share holders *see* sections 14 and 48 and notes thereunder

See also section 23 A and notes under it

Firm—

As regards the taxation of firms, *see* sections 2 (14) and (16), 14 and 48 and notes thereunder

See also section 23 A and notes under it

Discontinuance of business, etc —

See section 25 and notes

Succession or change in constitution—

See section 26 and notes

Association of individuals—

Not being a company or firm or a Hindu undivided family Specific reference has been made in the Act—by Amending Acts XI of 1924 and XXII of 1930—to such associations in various sections in the Act, *e g*, sections 3, 55, 2 (12), 14, 63 (2) and 56 so as to place beyond doubt the liability to tax—to the extent that they are taxable at all—of associations like Chambers of Commerce, Clubs, Co operative Societies and Buying and Selling pools As regards Chambers of Commerce, however, *see* definition in s 58 A (*b*) and report of Select Committee regarding that definition which is drafted on the assumption that the chambers are associations of associations and not associations of individuals Associations of individuals cannot be taxed on profits made *from among* the members themselves (*see* notes on Mutual concerns, *infra*) but they can be taxed in respect of

profits made from outsiders, and in certain circumstances, if incorporated, from shareholders also Presumably a Provident Fund governed neither by the Provident Funds Act, 1925 nor by Chapter IX A of the Indian Income tax Act can be considered to be an 'association of individuals' and taxed as such but paragraph 3 of the Income tax Manual says that they are not to be so assessed except at source in respect of income from investments and that they should not be charged to super tax at all

From the grouping of classes of assessees in section 3, it does not seem unreasonable to hold that the expression 'association of individuals' should be construed *ejusdem generis* with the previous words in that section It is difficult to say what are the common generic qualities but presumably (1) there should be joint interests and (2) there should be the right to sue and the liability to be sued as an association The definition of 'principal officer' in section 2 (12) and the procedure laid down in section 63 regarding the service of notices also give some clue as to the nature of the associations contemplated by the Act

Members of an 'association of individuals' are not entitled to any refund of tax like members of registered partnerships in respect of tax paid by them through the association—*see* sections 14 and 48, but they are exempted from tax a second time, in their hands, of their share of profits received by them if the profits have been taxed in the hands of the association—section 14 (2) (*c*)

The members of a partnership prohibited under the law would apparently not form an 'association of individuals' for this purpose but there is nothing to prevent the individual members of such prohibited partnerships being taxed in respect of income ultimately obtained by each individually *See* notes under section 4 (3) (vii) *See* also notes under section 2 (14)

Finance Act—Effect of—

The liability to tax under this Act presupposes as an essential preliminary the passing of a separate Act by the Legislature fixing the rates of Income tax and Super tax for the year This is done annually by the Finance Act The omission to pass such an Act does not, however, keep the entire Income tax Act in abeyance Refunds in respect of the preceding year, appeals and petitions for revision arising out of the preceding year's assessment, additional assessments under section 34 on account of "escaped" income of the preceding year, rectification of mistakes under section 35, etc, can be and must be made under the Act The Income tax Officer, however, cannot perhaps issue notices under section 22 (2) Nor would there be much point in his doing so, as the only object would be the collection of statistics which is not one of the avowed objects of the Act The obligation impos

ed on the principal officer of the company or the prescribed person to furnish a return of salaries paid and tax recovered thereon in the previous year will of course remain, as this is essential to enable the Income tax Officer to sanction refunds Similarly the obligation imposed on the principal officer of a company to give certificates under section 20 will remain All this discussion however is academic as there is not the remotest likelihood of the income tax being given up temporarily for any year or succession of years

Provisional Collection of Taxes Act inapplicable—

The Provisional Collection of Taxes Act XVI of 1918 applies only to taxes in the nature of Excise or Customs duties Income tax, super tax and similar taxes can therefore be levied only after the Finance Bill has received the assent of the Governor General in the usual course, or become law otherwise This applies as much to taxes collected at source under sections 18 and 57 as to taxes assessed directly on the person liable In the United Kingdom the Provisional Collection of Taxes Act applies to Income tax also

Assessment of Income tax on married women—

In the absence of a specific provision to the contrary in the Act, a married woman has to be separately assessed in respect of her separate income

Pensions received from funds such as the Indian Military Service Family Pension Fund by a widow on account of her children and on account of herself are distinct and separate from one another The pension of a minor orphan paid to his or her mother or a duly appointed or recognised guardian should not be included in the taxable income of the mother or guardian for the purposes of income tax assessment (Income tax Manual para 103)

In the Draft Bill of 1918 an attempt was made to assess married women jointly with their husbands but the Select Committee threw out the clause A suggestion reviving the idea was also made by the Taxation Enquiry Committee

Composition not permissible—

The provision in previous Acts that allowed a system of composition of assessment and enabled the Income tax Officer under specified conditions to enter into compositions with assessees has been omitted from the present Act No composition of assessment can therefore now be made although any composition entered into before the present Act came into force must be given effect to for the period for which the agreement was made —Income tax Manual, para 95

The existing compositions cannot be renewed when they expire Such a composition would be null and void, as the Legislature has to determine the rates of tax every year through the

Finance Act In this connection see *Gresham Life Assurance Society* v *Attorney General*[32] in which the Society produced correspondence with the Surveyor of Taxes and asked for a declaration that the correspondence amounted to a valid and binding agreement for the composition of tax for a certain number of years It was held that the construction put by the Society on the correspondence was not correct and that even if it was, the agreement would be *ultra vires* and invalid

Composition of taxes was given up in India in 1916

Source of income—Existence of—In year of assessment—

In the *National Provident Institution* v *Brown* and the *Provident Mutual Life Assurance Association* v *Ogston*[33] it was held by the House of Lords, under the United Kingdom Income tax Acts, that in order to be chargeable to income tax for a particular year in respect of income from a source, a person must possess that source of income in that year In *Whelan* v *Henning*[34] it was held by the House of Lords that not only should the source exist but that income from the source should exist during the year of assessment In *Grainger* v *Maxwell's executors*[35] it was held by the Court of Appeal that War Bonds were a different source of income from Exchequer Bills It has been held, however, that none of these decisions will apply to India[36] The English decisions were arrived at with reference both to the wording and to the scheme of the United Kingdom Income tax Acts, which are materially different from the wording and the scheme of the Indian Income tax Act Lord Haldane observed in the *National Provident case* that "speaking broadly at all events, the general principle of the Acts is to make the tax apply only to sources of income existing in the year of assessment Reading the Income tax Act, as a whole, it appears to me that the tax is one of a single kind based, speaking broadly, on a single principle

It is imposed on existing income, however the amount to be levied is to be computed in particular instances . There is little room permissible for conjecture based merely on probabilities in a taxing statute but I wish to add that, having regard to the words employed, I have only come to this view after doubt " Lord Atkinson arrived at the same decision but partly from historical considerations Lord Cave dissented

It should be mentioned, however, that the law in the United Kingdom has since been amended so as to get over these

(32) 7 Tax Cases 36
(33) 8 Tax Cases 57
(34) 10 Tax Cases .63
(35) 10 Tax Cases 139
(36) In re *Belarilal Mullick*, 54 Cal 636 2 I T C 328

decisions of the House of Lords—*see* section 22 of the Finance Act of 1926

Though the present tense is used in certain sections of the Indian Act, *e g*, sections 9 and 10, it is clear, both from the charging sections and the general scheme of the Act, that the tax is levied on the income of the previous year and has to be levied independently of the existence of the source of income or income from that source during the year of assessment The only anomaly in the scheme is in regard to deductions at source in respect of income from salaries and securities Though section 18 requires the tax to be deducted in certain case before it can be known, since the tax can be imposed only by the Finance Act of the next year, it is clear from the general arrangement of the Act that tax is collected in advance in anticipation of its imposition by the next Finance Act

Therefore in In re *Beharilal Mullick*,[37] Rankin, C J, observed that, though the intention is clear, the draftsmanship of sections 3 and 18 is defective and that the following words would better express the intention of section 3 —

"Where any Act of the Indian Legislature enacts that income tax shall be charged for any year at any rate or rates applicable to the total income of an assessee—

(1) tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act, in respect of all income, profits and gains of the previous year of every individual, company, firm, etc ,

(2) tax at that rate shall be deducted in accordance with, and subject to the provisions of, this Act from all salaries payable in that year on account of the income tax, if any, to become chargeable in respect thereof for the following year,

(3) tax at the maximum rate shall be deducted in accordance with, and subject to the provisions of, this Act from all interest on securities payable in that year on account of the income tax, if any, to become chargeable in respect thereof in the following year "

Profits from unlawful or illegal businesses—

There is no ground for saying that the profits arising from an illegal business are not taxable There is not a word in the Act to suggest anything of the kind, and it is a fallacy to say because the taxing authority levies from a person who is carrying on a profitable business, but an improper and illegal business or profession that therefore the authorities are countenancing such a profession They are doing nothing of the kind Their permission is not required and is not given, and cannot be

(37) 54 Cal 636, 2 I T C 328

withheld to a person who chooses to carry on an illegal business but the tax upon the profit arising therefrom has to be paid in common with the tax paid by every honest trader Section 6 (4) provides the head of income chargeable in respect of business The mere fact that the business is speculative or even gaming and wagering within the meaning of that expression does not make it any the less business For example supposing the question was one of profit made by a book maker, as to whose business there can be no doubt whatever that it is entirely gaming and wagering Section 11 provides that the tax shall be payable under the head of professional earnings in respect of the profits of any vocation followed by the assessee In the year 1886 the English Courts decided and the decision has never been called in question that a book maker attending a race course was carrying on a vocation[38] Where both the word business and vocation are used it may be appropriate to describe a book maker's business as a vocation but the greater includes the less and it is clearly included in the word business in our opinion The same view seems to have been taken in the text books on the subject with regard to the vocation of singer or prostitute and the Calcutta High Court in the case of *Birendra Kishore Manikya v Secretary of State for India* held that illegal cesses were assessable to income tax No doubt a burden is placed on the Income tax Officer to discover how far losses returned by assessees may be genuine or to what extent an assessee may have attempted to conceal gain but that is what the Department is there for Although it is not strictly relevant we may point out that any other view would result in an enormous burden being placed upon the income tax authorities namely of deciding in every single transaction which appeared in the books of any assessee in their jurisdiction to be of a speculative nature whether it was a gaming transaction within the meaning of the Contract Act and therefore against public policy That question is an extremely difficult question to decide in many cases A large number of merchants and other people carry on extensive business of a speculative nature which is not hit by the section in the Contract Act with regard to gaming because although the transaction may result in differences the legal effect of the contract may be no entitle the party to actual delivery It is none the less speculative in character, and any body concerned with the daily business of the courts knows how difficult it is sometimes to ascertain whether a speculative transaction is really a gaming one or not All such transactions in our opinion are business and the profits arising therefrom are taxable under this Act

In Madras a Bank cashier who received commission for recommending constituents to the Bank demanded a reference to the High Court regarding the taxability of the commission but dropped the case when the reference was made The question whether profits from illegal sources can be taxed was raised but not decided in *Mohideen Sahib* v *Commissioner of Income tax, Madras*[39 40] the High Court holding that no illegality had been proved in the case in respect of the source of income

(38) In re *Chun lal Kalyandas of Agra* 1 I T C 418
(39 40) 2 I T C 479

Per *Scrutton L J*— I rather think that Mr J Denman's language is used in a case as to betting which was invalid or unenforceable not illegal If he (Denman J in *Partridge v Mallandaine*[41]) meant to say that the Income tax Acts recognise illegal businesses in the sense of business which it was not legal to carry on because they were punishable I at present very much doubt whether any such extension of the Acts is possible [42]

In an appeal to the Judicial Committee of the Privy Council from the judgment of the Supreme Court of Canada regarding the assessability of profits derived within Ontario from operations in illicit traffic in liquor which were prohibited by provincial legislation in that respect, Viscount Haldane delivering the judgment of the Board referred to the above remarks of Scrutton L J in *Von Glehn's case* and refused to assent to the suggestion that Income tax Acts are necessarily restricted in their application to lawful businesses only So far as Parliaments with sovereign powers are concerned, they need not be so The question is never more than one of the words used It would not be appropriate to impart any assumed moral or ethical standard as controlling the literal interpretation of the language employed It was ruled therefore that profits from 'boot legging' were taxable [43]

The Supreme Court of the Irish Free State distinguished *Canadian Minister of Finance v Smith*[43] and held unanimously that profits from an illegal and criminal business were not liable to income tax

Per *Kennedy C J*— It is competent for the sovereign legislature to require crime to yield a quota out of its profits to national revenue The question is whether on the construction of the statute the legislature has done so I have after much consideration of the matter come to the definite opinion that income derived from criminal enterprises that is to say from enterprises prohibited by law and punishable as offences against the State is not within the contemplation of the income tax legislation and while not expressly brought within that legislation cannot be supposed to be contemplated by it the legislature cannot be supposed to contemplate the carrying on of that which it has prohibited and made criminal I wish however to make it clear that this judgment is limited to the case of profits derived from a wholly unlawful business or enterprise or transaction I am not prepared as at present advised to follow the view suggested by Scrutton L J in *I R Commissioners v Von Glehn & Co* as to the case of lawful businesses carried on in whole or in part in an unlawful manner As it does not arise in this case I reserve it for future consideration

That (the Privy Council Canadian case) was a case of Dominion legislation taxing profits from a source which in a particular province

(41) 2 Tax Cases 1 9
(42) *Inland Revenue v Von Glehn & Co* 1[illegible] Tax Cases [illegible]3
(43) *Canadian Minister of Finance v Smith* (19[illegible]) A C 193

was illicit under the local legislation, a different question from that we have to determine "

Per *Fitzgibbon, J*—" the carrying on of a lottery of sweep stakes is a criminal act punishable by indictment and not merely a business which may be carried on subject to penalties I can see a broad distinction between cases in the profits (of a lawful business) may have been derived from illegal methods of conducting it and cases such as the present one where the entire transaction or trade is illegal *per se* I hold as Scrutton L J was inclined to do in *I R Commissioners* v *Von Glehn & Co*, that the Income tax Acts are to be confined to lawful businesses though I am not prepared to add 'to the businesses carried on in a lawful manner'"

Per *Murnaghan J*—" there is a clear distinction between the carrying on of a lawful business in the course of which acts prohibited by statute may or may not be committed and the setting up of an enterprise every act and step of which is a criminal offence I do not believe that any well ordered state can consider that its own criminal law will not be enforced "[44]

Mutual concerns—Profits from—

'Profits' imply the existence of two persons—the trader and some one else with whom he trades Obviously a person cannot trade with himself Similarly a body of persons cannot ordinarily trade with itself, *i e* with its own members There can therefore be no 'profits' in the case of a club co operative society or a similar concern, which sells to or deals with the members only and returns the surplus—which it calls 'profits'—to the members The position, however is different if it has any *investments* or if it has transactions of a business nature with outsiders The position is also different if the body is incorporated though in certain circumstances it might make no difference whether the body was incorporated or not[45] The law in respect of mutual concerns is and has been largely the same both in England and in India It rests not on express statutory provisions but upon judicial pronouncements Though in the charging sections the English law refers to 'profits and gains' whereas the Indian law refers to 'income, profits and gains,' and 'income' is a wider concept and comprehends other things besides these 'profits and gains', there is really no difference because *income* from oneself to oneself would make no sense

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(44) *Hayes* v *Duggan* (1929) Ir R 406

(45) See *Liverpool Corn Trade Association* v *Monks* and *Jones* v *S W Lancashire Coal-owners' Association* 5 A T C (*infra*)

"I do not think that the money received by a club from the members composing it can be regarded as 'income'—a word which itself seems to imply something received from outside "[46]

'No man in my opinion can trade with himself he cannot in my opinion make what is in its true sense or meaning taxable profit by dealing with himself "[47]

"I do not understand how persons contributing to a common fund in pursuance of a scheme for their mutual benefits having no dealings or relations with any outside body can be said to have made a profit when they find that they have overcharged themselves and that some portion of their contributions may be safely refunded If profit can be made in that way there is a field for profitable enterprise capable I suppose of indefinite expansion "[48]

The surplus of receipts over expenditure cannot be profits in the case of a club which does not 'trade' with non members[48a] On the other hand the Royal Calcutta Turf Club was held to carry on 'business' and make profits in respect of its receipts from non members in exchange for advantages provided by the Club The fees in question were (1) entrance fees to the stand etc, (2) fees paid by owners of horses, (3) license fees of book makers (4) share of totalisator receipts[49]

Even a non mutual association may sometimes be such as cannot make 'profits' in the strict sense of the term A society founded for the diffusion of religious literature sold Bibles, etc, at a shop and sent out colporteurs to sell Bibles and act as cottage missionaries *Held* that this was not 'trade'

Per the Lord President—"When we turn to the methods they were not commercial methods The business carried on is not purely that of pushing the sale of their goods but on the contrary the duty of the salesman is to dwell over the purchase and make it the occasion of administering religious advice and counsel "[50]

On the other hand in *Grove* v *The Young Men's Christian Association*[1] in which the association ran a restaurant on commercial lines the restaurant was held to constitute a 'trade'

In India the taxation of such associations would depend not on whether they carried on a trade, but on whether they had income, profits and gains of a nature not exempted by the Act

(46) Per Martineau J in *United Service Club Simla* v *P* 1 I T C 113 2 Lah 109

(47) Per Palles C B in *Dublin Corporation* v *MacAdam* 2 Tax Cases 387

(48) Per Lord Macnaghten in *Styles* v *New York Life Insurance* 2 Tax Cases 460

(48a) Per Martineau J in *United Service Club Simla* v *P* 1 I T C 113 2 2 Lah 109

(49) *Royal Calcutta Turf Club* v *Secretary of State* 1 I T C 108 48 Cal 844

(50) *The Religious Tract and Book Society of Scotland* v *Forbes* 3 Tax Cases 415

(1) 4 Tax Cases 613

As the cases set out hereafter will show the question whether an association is mutual is essentially one of fact As already observed, there is no legal definition of mutuality One has first to determine with reference to the arrangements and transactions as a whole whether an association is mutual and if it is mutual, then tax it on the income, profits and gains made from transactions with outsiders

Chit fund—Stake-holder—Not assessable—

The assessee conducted a 'chit' fund as a stake holder and under the rules of the 'chit' the subscriptions received from the members minus 8 per cent deducted by the stake holder for expenses and charges including income tax were auctioned every month among the subscribers The lowest bidder at each auction was paid his bid and the difference between this bid and the amount actually put up for auction was distributed as premium among the chit holders in the shape of reduced subscriptions The assessee was assessed to income tax as an agent of the chit fund in respect of the entire premia distributed during the assessment year on the ground that such premia represented the profits of the fund *Held*, that the sums represented by the premia were not assessable to income tax as the transactions of the fund could not be said to bring any profit to the subscribers as a whole Also, even if such premia could be regarded as income, the stake holder could not be taxed on it as he had neither received it nor was entitled to receive it [2]

Mutual concerns—Club—Shareholders different from members—

A company limited by shares maintained a club The club was managed by seven members, of whom at least five had to be shareholders in the company The shareholders were not eligible as such for membership of the club, which was regulated by ballot, the voters being the already existing members The company issued 445 shares, of which 74 were held by non members of the club The number of members of the club was 289, of whom 220 were not shareholders of the company *Held*, that the company was not a mutual concern The fact of incorporation could not be neglected, and the fact that some of the share holders were members of the club was immaterial [3]

Mutual funds—How far taxable—

The Mylapore Hindu Permanent Fund consisted of shareholders who subscribed one rupee per month and the funds were lent out among the shareholders themselves, or occasionally in-

(2) *Board of Revenue v North Madras Mutual Fund* 1 I T C 172
(3) *Dibrugarh Club Ltd v Commissioner of Income tax, Assam*, 2 I T C 521

vested in securities or Bank deposits The profits consisted of (1) the interest paid by borrowers, (2) penalties levied on share holders, (3) interest on securities and Bank deposits It was *held* by the Madras High Court following *New York Life Insurance Co* v *Styles*[4] and distinguishing *Leeds Permanent, etc, Society* v *Malladaine*[5] that (3) was taxable but (1) and (2) were not

A company partly with permanent capital divided into 'shares' and partly with fluctuating capital called 'subscriptions,' received deposits from its 'shareholders' and 'subscribers' as well as from outsiders, and lent moneys to all the three classes, the greater part of the transactions being with outsiders Held that the society was not 'mutual' and that its entire profits were taxable[6]

After reviewing the following authorities, *viz* *New York Insurance Co* v *Styles* *Last* v *London Assurance Corporation*, *Equitable Life Assurance Society* v *Bishop*, *Liverpool Corn Trade Association* v *Monks* *Thomas* v *Richard Evans & Co*, *Cornish Mutual Assurance Co* v *Commissioners of Inland Revenue*, the Madras High Court held in the case of *the English and Scottish Joint Co operative Society*[6 a] (not registered in British India under the Co operative Societies Act, 1912) that the so called profits derived from the sale of produce to the only two members of the Society who were also Co operative Societies were merely the return of excess payments, and that the fact that a part of this return took the shape of a fixed rate of interest on capital subscribed by the two member Societies while the rest took that of a *pro rata* dividend on the purchases made no difference to the true nature of this notional profit The profit was therefore not taxable The Crown's argument was that it was open to the Society to take other Societies also as members and that the interest paid to each member which was really like a preference dividend bore no relation to the purchases made by that member

Golf Club—Fees from non members—

A golf club, not a 'company', and admittedly a *bona fide* members' club, was bound under a clause in its lease to admit non members to play on its course on payment of green fees to be fixed by the lessors but subject to a minimum fixed in the lease These green fees were paid by the non members and entered into

(4) 2 Tax Cases 460
(5) 3 Tax Cases 577
(6) *Trichinopoly Tennore Permanent Fund Ltd* v *Commissioner of Income tax* 53 M L J 881 (F B)
(6-a) 3 I T C 385

the general accounts of the Club which showed an annual excess of receipts over expenditure *Held*, that the Club, in so far as it admitted non members, carried on, for income tax purposes, a concern or business capable of being isolated and defined and in respect of which it received profits that were liable to tax[7]

Per *Kennedy L J*— It is not therefore the common case of a golf club which admits to the use of its accommodation players who are introduced by a member or are approved by the club committee and who upon such introduction or approval and upon payment according to the rules of the club are admitted to the privileges of members according to the rules of the club for some specified period It is not necessary to decide the point but in such a case I am inclined to think the persons to whom such privileges are accorded might fairly be regarded as becoming for the time members of the club subscribing to its funds But upon the facts appearing in the case it appears to me that this club is really carrying on the business of supplying to the public for reward a recreation ground fitted for the enjoyment of the game of golf and that the receipts derived from this business are in the nature of profits and gains in respect of which it is liable to assessment for income tax [7]

The local golf clubs and the Town Council in a certain town entered into an agreement and vested the control of the golf links in a Committee The Town Council contributed towards a part of the upkeep of banks and bridges The subscriptions leviable from users were fixed except as regards visitors *Held* that the Committee carried on a trade The case was not like that of a club and the fact that the Committee could not increase the fees was no reason to hold that there was no trade[8]

In *Inland Revenue v Stonehaven Recreation Ground Trustees*[9] the grounds were open to all members of the public who had to take season tickets of varying duration The governing body were appointed from year to year by the season ticket holders The rates for tickets were so regulated as to cover the expenditure and not to make any surplus *Held* that the institution was not 'mutual' since the ticket purchasers were not received into any body corporate or incorporate

Mutual Insurance Company—

A mutual life insurance company had no members except the holders of participating policies to whom all the assets of the company belonged At the close of each year an actuarial

(7) *Carlisle and Silloth Golf Club* v *Smith* 6 Tax Cases 201
(8) *Carnoustie Golf Course Committee* v *C I R* (1929) S C 419 129 Sc L T 366 8 A T C 205 14 Tax Cases 498
(9) 8 A T C 523

valuation was made, and the surplus, if any, was divided between *the participating policy holders, who received their dividends in* the shape either of a cash reduction from future premiums, or of a reversionary addition to the amount of their policies The surplus divided consisted partly of the excess of the premiums paid by the participating policy holders, over and above the cost of their insurances, and partly of profits arising from non participating policies, the sale of life annuities, and other business conducted by the Society with non members *Held*, by Lords Watson, Bramwell, Herschell and Macnaghten (Lord Halsbury, L C, and Lord Fitzgerald, dissenting), that so much of the surplus as arose from the excess contributions of the participating policy holders is not profit assessable to the income tax [10]

The principle of this decision is, in the words of Lord Watson, that when a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities or of capital sums to some or all of them on the occurrence of events, certain or uncertain and stipulate that their contributions so far as they are not required for the purpose shall be paid back to them the contributions so returned should not be regarded as profits " In distinguishing the case from the *London Assurance Case* [11] Lord Watson said

In *Styles' Case* there are no shares or shareholders in the ordinary sense of the term but each and every shareholder of a participating policy becomes *ipso facto* a partner in the company with a voice in the administration entitled to a share in the assets and liable for all losses incurred by it

The fact that the New York Insurance Company was incorporated did not make any difference It is seen from Lord Herschell's judgment that the Attorney General conceded that the incorporation did not affect the issue Lord Macnaghten pointed out that, so far as participating policy holders are concerned, the company was not formed for making profits, every member taking a participating policy becoming *ipso facto* a member of the company

It follows from the principle of the decision in the above case that the business done with the members by such a Society is of a different nature from the business done with non members The profits from the latter are taxable But it should not be inferred from this that in every case the profits resulting from business with members should be separated from the profits from business with outsiders If this were done it would be necessary, for instance, to exempt from taxation profits made by a Bank in

(10) *Styles v New York Life Insurance Company* 2 Tax Cases 460
(11) 2 Tax Cases 100

lending to its shareholders or by a Railway in carrying its share holders The test is not whether the corporate body deals with its individual members or not but whether the body is in its essence a 'mutual' body That is, does it so arrange with its members that the surplus is automatically returned to the mem bers? And does it primarily do business with its own members and only incidentally with outsiders? In the *Mylapore Fund case* quoted *supra* if the Fund had freely lent to outsiders the Fund could not have claimed to be a mutual association The test in such cases is first to find whether an association is 'mutual', then only we have to separate the two parts of its profits

Proprietary Life Assurance Company—Restricted dividends—Not Mutual—

Under the law of the State of New York a share capital of $100,000 is required to be subscribed by every Life Insurance Society and to be invested in securities The shareholders of a society established under this law were, by their Charter, en titled to receive a dividend not exceeding seven per cent per annum The earnings of the Society over and above the divi dends, losses and expenses were to be accumulated, and every five years after actuarial valuation each participating policy holder was to be credited with a portion of the available surplus The Society was managed by Directors appointed by the share holders The Charter gave power to the Directors to provide that each policy holder of $5,000 should be entitled to vote at the annual election of Directors, but this power had not been exer cised The Society granted non participating policies as well as participating, and did other business, the profits from all sources going to form the surplus The Society had a branch in London, and it was claimed that the profits of the branch were not assess able to income tax *Held*, that the profits were assessable, the case being governed by *Last v London Assurance Corporation*[12] (set out under section 10 *infra*) *Equitable Life Assurance Society of United States* v *Bishop*[13]

Building Society—

A Building Society, whose members consisted of investors and borrowers, *made advances to the latter upon the security* of their properties In all cases the advance was made in res pect of one or more shares which the borrower took in the Society, and upon each of which he paid 2*s* 6*d* per week in repayment of the advance, together with interest thereon The Society re fused to allow deduction of income tax by the borrowers in

(12) 2 Tax Cases 100
(13) 4 Tax Cases 147

respect of the interest included in the repayments, on the grounds that the interest could not be distinguished, and that it was not 'annual' interest *Held*, that the Society was liable to assessment on the interest received, whether it be annual or not [14]

Co-operative Society—

A Co operative Society which buys milk from its members and sells it to outsiders is making taxable profits [15]

Per *Rowlatt J*—'It has no profit from buying milk from its own members and if the public to whom they sell do not pay for it they do not get any profit at all The profits are made by the selling of the article not by the buying of it at all in the meaning of this sub section '

The question in the above case arose with reference to the Corporation Profits Tax Act which exempted profits of such societies arising from "trading with its own members", but the principle enunciated by Rowlatt, J, is capable of extension to income tax also No profits would arise, if the Society bought from outside and sold to its members only

Social Club—

A company was formed to take over a Social Club There was no share capital and the members of the company were the same as the members of the Club The company was of course a separate legal entity apart from the members but in substance the incorporation had not affected the members *inter se* or their relations to the Club *Held*, that a business or trade or under taking of similar character was not being carried on by the company [16] This decision, however, was overruled in the *Cornish Mutual Case* cited *infra*

Mutual trading—Trading and making profits—Distinction between—

A limited liability company was formed for carrying on insurance other than life insurance The number of members was unlimited Every person taking out a contract became a mem ber automatically and remained as such during the currency of the contract Each new member paid an entrance fee The directors were empowered to set aside sums for reserve and make calls on shareholders for general expenses There was no sub scribed capital *Held*, that for the purposes of the Corporation Profits Tax the company was carrying on a 'trade' though it

(14) *Leeds Permanent Benefit Building Society v Mallandaine* 3 Tax Cases 5—(referred to in the Mylapore Fund Case)

(15) *Commissioners of Inland Revenue v Sparkford Vale Co operation Society* 12 Tax Cases 891

(16) *Commissioners of Inland Revenue v Eccentric Club, Ltd*, 12 Tax Cases 657

was not liable to income tax The House of Lords also doubted the correctness of the decision of the Court of Appeal in the *Eccentric Club Case*[17] *See also* notes under section 2 (4)

This decision, however, hardly affects the position in India in which there is no provision for taxing the profits of mutual trading concerns as there was in the United Kingdom Corporation Profits Tax Acts The decision of the House of Lords in the *New York Insurance Case*[18] applies and the profits made by a mutual association cannot be charged either to income tax or to super tax *See* however the cases set out below

Trade Association—

The Liverpool Corn Trade Association was a company formed to promote the interests of the corn trade by Parliamentary and other action, to adjust disputes between persons engaged in the trade, to provide, regulate and maintain an exchange, market and room for the corn trade in Liverpool, and to establish and maintain a clearing house for the clearance of contracts Shares could be held only by persons engaged in the corn trade and no member could hold less than one or more than two shares The second share could be requisitioned by the company for a new member if no shares were otherwise available In addition to the members there were also subscribers who were elected from time to time by the directors but had no shares and no right to vote and merely enjoyed the services and facilities provided by the Association All the fees and subscriptions belonged to the Association absolutely and were disposed of at the discretion of the directors The directors could set aside sums to the credit of a reserve fund and recommend the payment of dividends which had to be declared by the Association in a general meeting but as a matter of fact no dividends had been declared for nearly 20 years It was contended by the Association that the transactions with the members were mutual and the resulting profits not liable to tax The profits made from non members were admitted to be liable to tax *Held,* that the profit was assessable to tax even though it resulted from transactions with the members

Per *Roulatt, J*—' in the *New York Case* there was no share capital to provide any assets or to form the basis of any dividend people who came to that corporation and tendered premiums and were accepted for life insurance on a participating basis became what was called members of that corporation—not shareholders but members of that corporation—and the operation

(17) *Cornish Mutual Assurance Co* v *Commissioners of Inland Revenue* 12 Tax Cases 841

(18) 2 Tax Cases 460

which was carried on and which was said to yield profits in that case was simply the operation of collecting money, to put it quite shortly, from *those shareholders—from those members*, those policy-holders—and putting them under a proportionate liability to provide further moneys, if necessary, if there were losses and, on the other hand, affording to those policy holders the protection of insurance and the possibility of a dividend declared to them, not as shareholders in the ordinary sense, but as policy holders, which would be made good to them not by a payment, but by a reversionary addition to the value of their policies

where there is not any share capital and no shareholders, but you call the policy holders members of the company, so that they may go and vote at meetings, and so on, then it does not matter if there is an incorporation, because the corporation is merely an entity which stands at the back, and all it is doing is to collect from a certain body of people certain funds and hand them back to them as far as they are not wanted In a case like that it does not matter whether *there is an incorporation or not, because there is nothing belonging to the* corporation which is severable from what belongs to the aggregation of individuals But in a case of this kind, where there is a *share capital, with a chance of dividends, a chance to a right to dividends* if declared, upon the share capital, and to one side of that a dealing with people who happen to be the owners of the share capital, affording benefits to those people one by one individually, for which they pay money by way of subscriptions and by way of entrance fees as a sort of over riding subscription, if I may use that word, which opens the door to subscriptions, there is no reason at all for saying that you neglect the incorporation, or that you can regard as otherwise than as profits the difference which is obtained by dealings between that corporation and people who happen to be its members "[19]

Mutual insurance—Workmen's compensation—Indemnity against—

The assessees were a company formed to indemnify the members against claims on account of workmen's compensation. The members were colliery owners Each member had to contribute on the basis of the wages paid by him The contributions went into a general fund from which sums were from time to time transferred to a reserve fund The general fund was the primary fund for meeting claims Part of the risk was reinsured Members could retire on giving six months' notice and a retiring member was entitled to take with him his proportion of the reserve fund *minus* his proportion of the expenses and liabilities of the association up to the date of his retirement The Special Commissioners felt some difficulty in reconciling the *New York Life Insurance Case*[20] with *Salomon v. Salomon & Co*,

(19) *Liverpool Corn Trade Association Ltd v Monks* 5 A T C 288, 10 Tax Cases 442.

(20) 2 Tax Cases 460

Ltd[21] *Held,* that the profits made by the company were not taxable

Per *Rowlatt, J*—It is true to say a person cannot make a profit out of himself if this is what is meant that a man may provide himself with something at a lesser cost than he could buy it or do something for himself or provide service for himself—shave himself if I may take a simple illustration—instead of employing somebody and paying him to do it He does not make a profit he saves money but he does not make a profit and, in that sense it is true to say that a person does not make a profit out of himself But a company can make a profit I think out of its members quite clearly That is to say it may make a profit out of its members as customers It may do that although it can only deal with its members, it may make a profit out of its shareholders to put it quite clearly An ordinary company may make a profit out of its shareholders as customers although its range of customers is limited to its shareholders (as Lord Halsbury put it in the *New York Case* if a betting man is to be taxed on bets it is none the less betting because he only bets in a certain club) but that is only because the company only deals with the shareholders as customers and if it makes profits as a railway company by carrying its shareholders or if a trading company by trading with its shareholders even if it is limited to trading with its shareholders and by buying and selling makes a profit that profit belongs to the shareholders in a sense but it belongs to the shareholder as a shareholder It does not come back to him as a purchaser or customer It belongs to him as a shareholder upon his share That seems to me quite simple and quite obvious But now one has got to the case in the *New York Insurance Company Case* as I understand it where all that the company does is to collect money from a certain number of people and apply it for the benefit of those same people not as shareholders in the company but as the people who subscribed it and as I understand the *New York Case* what they said was this that in that case there is not any profit it does not matter if you call these people members of the company or call them participating policy holders or call them anything you please all that this company is doing is to collect money from people for those people to do things for them and let them have the balance of their profit in some way or other that is all it is doing and there is no profit in that transaction If the people do it for themselves there is no profit If they incorporate a legal entity to do it for them and to provide the machinery for them there is no profit any more not because you must disregard the entity of the company and say it is only the individuals—which is wrong that is what seems to puzzle the Commissioners below It is only because there is not any profit The money is simply being collected from those people and handed back to those people in their character of the people who have paid it—not handed to them in the character of shareholders or anything else because that would be introducing different considerations because there the company would be taking an interest severable from the people who paid the money—but

(21) (1897) A C 22

merely receiving the money from one set of people and handing it back to the people who have paid it, and as their right This is what I understand is the *New York Case*

Now what have we here? Is there any distinction between this case and the *New York Case?* I do not think there is any I cannot see any distinction This money which is subscribed by these members is used for their protection, and the fund belongs to them, and a large amount is kept in hand, and I must say I can see quite well that, inasmuch as the money is not distributed year by year, and the calls are not limited to the actual losses, but a fund is built up, you can say in a certain sense that there this company has got a fund which it holds as a company, and that succeeding people who come in come into a company which has got a fund, and therefore there is something here which the company has which is not divided among the people who pay it, but it is kept in the hands of the company *in medio,* and therefore you have the company here making a fund which does not go back to the people who subscribed it individually But I think that must have been the case in the *New York Company's Case* too because they had a reserve fund there, and that reserve fund must have meant that, when all is done as regards the particular loss, when a life drops and the assured's executors are paid the amount due upon his policy, with bonus additions, there is still something left in the fund every time, so that the company is always surviving with a fund in its hands beyond what is necessary to pay the claims as they become due I think that must have been the case in the case of the *New York Life Insurance Co* v *Styles,* and yet it made no difference and I think the broad principle laid down was that, if the interest in the money does not go beyond the people who subscribe it, or the class of people who subscribe it, then there is no profit of any sort earned by the people themselves, if the people did it for themselves, and there is none if they get a company to do it for them That is all there is in the case

Both the House of Lords and the Court of Appeal confirmed Mr Justice Rowlatt's judgment The House of Lords considered that *Styles' Case* covered cases of this kind

Destination of profits—Immaterial—Does not affect liability to tax—

The destination of the income, profits or gains is immaterial, so long as it is income, profits or gains to the assessee who is sought to be taxed *Paddington Burial Board* v. *Commissioners, Inland Revenue*[23]

Profits applied in aid of poor rates—held *not* exempt

Per *Day, J*— Once profits are ascertained to exist . Income tax attaches "

(22) *Jones* v *South West Lancashire Coal owners' Association* and *Thomas* v *Richard Evans & Co*, 6 A T C 641, 11 Tax Cases 790

(23) 2 Tax Cases 46

Mersey Docks v *Lucas*[24] profits applied to creating a sinking fund for extinguishing debts—held *not* exempt

Per the Lord Chancellor — The word profits does mean the incomings of the concern after deducting the expenses of earning and obtaining them before you come to an application of them even to the payment of creditors of the concern The gains of a trade are that which is gained by the trading for whatever purposes it is used whether it is gained for the benefit of the community or for the benefit of individuals

Southey v *King's Lynn Harbour Mooring Commissioners*[25] (a similar case)

Per *Smith J*— If once you get a taxable profit it is immaterial what the destination of that sum may be'

City of Dublin Steam Packet Company v *O'Brien*[26] (a similar case)

Blake v *Imperial Brazilian Ry*—guaranteed interest received from Government devoted to payment of debenture interest and to payment of sinking fund—*held* that the whole of the guaranteed interest received was taxable A similar case was *Nizam's Guaranteed Railway* v *Wyatt*[28]

See also *Webber* v *Glasgow Corporation*[29]—application of profits to the common good of the burgh, *Armitage* v *Moore*,[30] application for the benefit of creditors, and also some of the English cases cited under charitable purposes (the position regarding charitable purposes is however radically different in the Indian law—*see* notes under section 4 (3) (i) and (ii)

They are nevertheless for this purpose a trading company and these sums are not the less profits by reason of their ultimate destination—Per Baron Pollock—*Dillon* v *Corporation of Haverfordwest*[31]

It does not matter what the income is expended on if the subject matter is taxable[32]

It is idle to argue such a question *i e* whether the mode of distribution of a person's income cannot affect his liability to taxation or even to occupy public time in referring to it because the very point was decided by the House of Lords in the case of the *Mersey Docks etc* v *Lucas* and in making that decision Lord Selborne almost apologised

(24) 2 Tax Cases 25
(25) 2 Tax Cases 201
(26) 6 Tax Cases 101
(27) 2 Tax Cases 58
(28) 2 Tax Cases 584
(29) 3 Tax Cases 202
(30) 4 Tax Cases 199
(31) 3 Tax Cases 31
(32) Per Rowlatt J—*Board of Conservators of Severn Fishery District* v *O May* 7 Tax Cases 194

for giving his reasons as in substance the question had been decided twenty years before by the House of Lords ...[33]

" ... If this is not profit ... the amount of profit ... must depend on the resolution of the company to pay off or not to pay off debts "[34]

" Income tax cannot be due or not due according to the manner in which a person making profit pleases to deal with it "[35]

"If money is otherwise liable to income tax it cannot escape taxation by reason of its being applied to a capital purpose "[36]

A sum receivable as salary or wages is not the less salary or wages because it has to be applied in a particular manner[37]

The compulsory application of income to a specific purpose does not prevent it from being income[38] nor does it relieve the income from liability to taxation[39]

See also *In re Royal Calcutta Turf Club*[40] (an Excess Profits Duty Case)

Income, profits or gains withheld at source—

Difficult problems arise when a portion of the income, profits or gains is withheld at the source before the income reaches the assessee The test to be applied in such cases is whether the withholding merely represents the payment of a personal debt or liability of the assessee or represents a share in the income itself to which the assessee has only a residual claim after the prior claims have been met In the former case the withheld income clearly belongs to the assessee and is taxable, while in the latter case it is not In other words, the test is whether there is an effective alienation of the income at the source, *i e*, before the assessee can claim it The test, however, is a difficult one to apply and border land cases often arise as will be seen from the decision set out *infra*

Salary attached—is liable to tax *See* para 25—Income-tax Manual set out under section 7

Tax withheld at source—Income of assessee—

The income tax which is withheld at source is clearly part of the assessee's income and of this there can be little doubt Ex majore cautela, however, section 18 (4) makes this quite clear.

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(33) Per Palles C.B—*Dublin Corporation v MacAdam*, 2 Tax Cases 400

(34) Per Lord McLaren—*Arizona Company v Smiles* 3 Tax Cases 149

(35) Per Lord Traynor—*Cranstle Company v Hutton*, 5 Tax Cases 168

(36) Per the M of R in *Hudsons Bay Co v Stevents*, 5 Tax Cases 436

(37) *Smyth v Stretton* 5 Tax Cases 36

(38) *Tennant v Smith* 3 Tax Cases 158 p 16., *Harris and Corporation of Irvine* 4 Tax Cases ..1 at p .3., *Smyth v Stretton* 5 Tax Cases 36

(39) *Mersey Docks v Lucas* 1 Tax Cases 38., *Trustees of Mary Clark Home v Anderson* 5 Tax Cases 48

(40) 1 I T C 108

The tax is a personal liability of the assessee and it is only the convenience of the administrative machinery that is responsible for the tax being collected at source Similarly the portion of a person's income attached in favour of creditors or a compulsory payment by a husband to a wife on account of the latter's maintenance are all personal debts and not shares of income *withheld at source* A voluntary payment is in no case deductible, and even necessary payments are not always deductible See, however, *Eadie v Commissioners of Inland Revenue, Earl Howe v Commissioners of Inland Revenue, Commissioners of Inland Revenue v Paterson, Commissioners of Inland Revenue v. Wemyss, infra*

Encumbered property—Income from—

Per Lord Davey in *London County Council v Attorney General*[41]—"It was *no doubt* considered that the real income of an owner of incumbered property or of property charged say with an annuity under a will, is the annual income of the property less the interest on the incumbrance or the annuity "

This was explained by Lord Macnaghten in *Attorney-General v London County Council*[42] to mean that the charge for the interest or the annuity ought to be a *real* burden

"If the interest or the annuity is discharged by some person other than the incumbered owner or deviser without recourse to such owner or deviser the burden is nominal "

The above dictum of Lord Davey, however, should be understood with special reference to the sections in the English Acts which he was construing Suppose, for example, that the income comes from the letting out of leasehold property could the net rents received be reduced for taxable purposes because there is a charge on the assessee's property as a whole for his father's widow's annuity? No It may be true in one sense that income is not real income unless the person can control it for his own purposes or absorb the whole of it for his benefit, but the Court has no authority to follow this line of argument Further in such cases the annuitant is not joint owner of the income in a legal sense consistent with the machinery and purposes of the Act[43]

Trust—Liability to tax—

Difficult questions arise in determining who is liable to tax—whether the legal owners or the beneficial owners, and the answers depend, as will be seen from the decisions set out, on the facts of each case and the general law relating to trusts

(41) 4 Tax Cases 265

(42) 5 Tax Cases 242

(43) *See* per Rankin, C J in *Raja Bejoy Singh Dudhuria v Commissioner of Income tax, Bengal*

See also the decision set out under section 40, and notes

Debts—Not charged on income—

'The payment of interest on estate duty was not an outgoing necessary for obtaining the income from investments The interest on estate duty was not legally charged upon or payable out of the sum received for dividends but was payable out of any moneys in the hands of the appellants as trustees

Mr M suggested that when a tax payer collects an income and is subject to the obligation of diverting it into two streams one of which streams is to flow into the coffers of a creditor, then he must be considered to have collected that part of his income for and on behalf of the creditor In my view the tax payer in such a case collects the whole income for himself and then (if he is an honest man) pays his debts to his creditor '[44]

Shares—Beneficially transferred—Dividends on—

With a view to affording certain employees a closer personal interest in the business, the principal controlling share holder (Sir Charles Parsons) set aside some shares of his to be transferred to each employee when the dividends thereon together with any sums paid by the employee amounted to the par value of the shares The dividends and any payments by the employees were credited to the shares in a separate account for each employee, and if the employee died before the shares were fully paid for, the full amount credited to his account was to be paid to his estate in cash But until the actual transfer of the share to the employee the shares were in the name of Sir Charles Parsons who received the dividends and had full control over the shares *Held*, that the dividends were taxable as the income of Sir Charles Parsons[45]

Profits—Share of—Accumulated—

The assessee made an advance of £7,000 to a company in 1905 In consideration of this he received (i) from the Company, £7,000 5 per cent Debentures repayable by the Company after December, 1914, by half yearly instalments of £500, and (ii) from a director of the Company, 5,600 £1 ordinary shares (being one fifth of the total share capital of the Company), of which he was to retransfer 400 shares on receiving each payment of £500 Subject to certain adjustments he was also to receive one fifth of the Company's profits each year up to December, 1914, and thereafter a share of the profits corresponding, in effect, to the proportion of the £7,000 Debentures remaining unrepaid from time to time The Company did not pay him in respect of the profits

(44) Per Viscount Cave—*Lord Inverclyde's Trustees v. Millar*, 9 Tax Cas. 14

(45) *Sir Charles Parsons v. Commissioners of Inland Revenue*, (C.A.), 7 A.T.C. 132, 13 Tax Cases 700

for the years 1915, 1916 and 1917 until January 1920, when, in accordance with a resolution in general meeting in June, 1919, £6,000 was paid to him in settlement of his dues for those three years He received nothing further in respect of profits until May, 1921, when in accordance with resolutions of the directors and the shareholders in general meeting in December, 1920, he was paid £10,000 in full settlement of the liability under the agreement up to the 31st December, 1921, the prospective date of its termination The sums of £6 000 and £10 000 were assessed to super tax for the years 1920 21 and 1921 22 respectively as forming part of his total income for the years 1919 20 and 1920 21 respectively and, on appeal the Special Commissioners confirmed the assessments *Held* that under the original agreement, the assessee was entitled to have his share of the profits paid to him each year and that for the purpose of computing his income for super tax purposes, the said sums of £6 000 and £10 000 must be spread over the years in respect of the profits of which they were paid subject however to the entire exclusion from liability to super tax of such part of the sum of £10 000 as represented a composition of his right to receive a share of the profits of the year 1921 [46]

On the death of his grandfather on 11th June 1917 the assessee succeeded to certain estates as heir of entail in possession, his father Lord Binning the heir apparent having predeceased on the 12th of January 1917 By his marriage contract Lord Binning as heir apparent had charged the estates with certain payments to his widow and the younger children On petition by the assessee the Court of Session had restricted the charges on the estate The assessee contended that the payments to the widow, etc were not 'payable' till the Court had decided on his petition *i e* he claimed to deduct from his income the accumulated payments on account of the period from the date of his father s death to the date of the judgment *Held* that the charges were payable from his father s death the Court deciding only the precise amounts payable *i e* were to be spread over several years and deducted from the assessee s income of each year [47]

It is doubtful however, whether this decision and the one in the *Hanley case* will apply to India Under section 5 of the English Income tax Act 1918 in estimating the income of the previous year for the purpose of super tax,

any income which is chargeable with income tax by way of deduction shall be deemed to be income of the year in which it is receivable

(46) *Hanley v Commissioners of Inland Revenue* 9 Tax Cases 3.1

(47) *Commissioners of Inland Revenue v The Earl of Haddington* 8 Tax Cases

notwithstanding that the income accrued in whole or in part before that year "

In the absence of a similar provision under the Indian Act, there is no authority for spreading income over years other than the year of receipt the latter being determined in accordance with section 13

Employees—Contingent interest in business—

The owner of a business, who desired its continuance after his death, provided, *inter alia* that the net profits should be divided annually among certain selected employees, of whom the appellant was one in certain shares Ten per cent of the profits was to be paid over to the said employees in proportion to their shares, but the remainder was not to be drawn out by them until the whole of the late owner's capital had been paid out In the meantime their shares were credited to their respective accounts in the books The employees had no power to sell or dispose of their interests which did not vest in them till the whole of the capital had been paid out On a claim by the appellant to abatement—*held*, that the business, was the property of the trustees, that the employees were only employees and not partners, and that the appellant was not assessable in respect of his share of the 90 per cent which was placed to his credit in the books but was not paid over to him, it not being a part of his income

Per *Lord Stormonth Darling*— Of course the mere fact that under a man s contract of service a portion of his salary is held up or payment of it deferred does not less make it a part of his income The deferred portion of the salary is still salary There is all the difference between a case of that kind and one where the fund said to form part of a man's income may, from causes over which he has no control never be his at all [48]

House—Life-rent use of—No power to let—Annual value of—Not income—

Under his father's will the assessee was entitled (in the events which happened) during the subsistence of the trust of the residuary estate, to occupy a mansion house and grounds so long as the trustees should find it expedient to retain it in their hands unlet The trustees were directed to hold it in trust "for the life rent use' of the assessee so long as his mother should remain alive, subject to his not contravening a certain condition The assessee had no power to let the property The residuary estate was to be held in trust until the mortgages on the testator's estate had been reduced to £100,000, the ultimate remainder being

(48) *Walker v Reith* (1906) 8 F 381, 43 Sc L R 245

to the assessee absolutely and in fee, if then living, and in default to his issue.

The assessments to income tax under Schedule A (in respect of the house and grounds) and under Schedule B (in respect of the grounds) were made in the name of the assessee, but the tax was paid by the trustees *Held* (for the purpose of super-tax) that the annual value of the house and grounds did not form part of the income of the assessee.[49]

Surplus income retained by Trustee—Not income of beneficiary—

Under his ante-nuptial marriage contract the assessee assigned to trustees his interest in certain shares in a company on trust to pay the income to himself for life, but, in the event of the yield from certain of the shares exceeding the rate of 12½ per cent free of income-tax in any year, the trustees were to retain such excess income and apply it from time to time in reducing the charges on the trust funds created by the assessee.

Subject to a life interest to assessee's wife, if she survived him, the settled funds were to go to the children and, in default of children to attain a vested interest, to revert to the assessee. The assessee also had power to redeem the trust funds for £100,000 to be held on the same trusts

Held, that the income under the marriage contract from the said shares so far as exceeding 12½ per cent per annum did not form part of the assessee's income for the purposes of super-tax.[49]

Encumbered property—Income charged in favour of creditors—

"The income there[50] in question was not applicable for payment of a debt of the person to whom it otherwise would have belonged . . the object of the destination of that part of the income was the increase of the settled funds"—Per *Warrington, L J*[1]

"The question is whether when a debtor buys a property with borrowed money and charges the proceeds of the property in favour of creditors to repay the debt, these proceeds are income of the debtor . . . and I may ask if they are not income of the debtor whose income are they? If it is not the debtor's income it must be the creditor's income and I am not sufficiently topsyturvy to think of a creditor discharging debts due to him out of his own income "—Per *Scrutton, L J*, *ibid.*[1]

"If a person has alienated his income so that it is no longer his income, he is not super taxed on it, but if he merely applies the income so that it passes through him and goes on to an ulterior purpose, even

(49) *Commissioner of Inland Revenue v Wemyss*, 8 Tax Cases 551

(50) The *Wemyss* case *supra*

(1) *Commissioners of Inland Revenue v Paterson*, 9 Tax Cases 163.

although he may be obliged to do that it still remains his income the line is very hard to draw between what is an alienation and what is a binding application From that point of view it is very important to look and see what the purpose of the application is Whether it is to pay a man s own debt or for some other purpose but logically the purpose of an alienation if it is an alienation does not matter and the purpose of an application if it an application does not matter

The *Wemyss case* was clearly a case of alienation (In it) a man resettling funds in which he had a reversionary interest resettled *them so as to exclude himself from the enjoyment of any part of the income* the Court of Appeal held (in *Parker s case*) that it was merely a case of a lady entering into an arrangement to apply her income to the satisfaction of a certain demand which demand happened to be a debt owing by herself which perhaps made the construction of the transaction easier but which I do not believe can be a necessary circumstance —Per *Rowlatt J*"

Alienation of income—Declaration of trust—Whether effective—

In 1916 the assessee decided to make some provision for his wife and daughter A deed of settlement was drafted in January 1917 Under this deed he and his wife were appointed trustees The completion of the deed was, however delayed till April 1919 Under that deed trusts relating to property vested in the trustees on or before January 1917 were to become effective from that date In respect of other properties specified in the schedule to the deed the trusts were to become effective from the date on which such properties became vested Along with the items of the schedule were some shares in a company of which the assessee was a director These shares stood in his name At a directors meeting held in February 1917, sanction was given to these shares being transferred to the joint name of the assessee and his wife and an account in the joint names of the trustees was opened in the company s books in March, 1917 Thereafter the dividends were paid into the account of the trustees but until the trust deed had been completed the shares remained in the assessee s name The assessee had verbally informed his wife that he would eventually transfer the shares to the trustees and that meantime he would hold them upon trust The question arose whether there had been a valid declaration of trust with effect from January 1917 and as a consequence the assessee was liable to super tax in respect of the income after that date *Held* by the House of Lords confirming the decision of the Court of Appeal that an effective trust had not been created on that date The verbal declaration made by the assessee to his wife was not

(a) *Col Parker (Executor of Parker) v Commissioners of Inland Revenue)*
" T C 153

an immediate and complete declaration of trust but merely a declaration of his intention to settle his shares. Meanwhile he kept them *in medio* so that they might be ready when the trust was effectually declared [3]

Trustees—Transfer of shares to—Dividends declared before execution of trust deed—

Mr. Stott owned some preference shares in a company which he transferred by a deed dated 29th April, 1919, to the joint names of himself and Mr B as trustees for Mr B 's minor sons On 30th April a trust deed was executed which provided *inter alia* that "the trustees will henceforth stand possessed of the said shares, and of the income thereof upon trust" for the benefit of the minors On the same day, *i e*, 30th April, Mr Stott received from the company a cumulative preference dividend covering the last 7½ years The cheque for the dividend was dated 29th April The company registered the transfer of the shares on the 6th of May On the 9th of May a dividend warrant was endorsed by Mr Stott and paid into the trustee's joint account The Commissioners held following the decision in *Duncan v Commissioners of Inland Revenue*[4] that the trust became effective from 30th April and that the dividend was the income of the recipient, *viz*, Mr Stott *Held*, reversing the decision of the Commissioners, that an effective trust had been created by the transfer of the shares That part of the decision of the Irish Court of Appeal in *Commissioners of Inland Revenue v Allan* which was not appealed against to the House of Lords was followed [5]

Guaranteed profits—

Profits received by a company from an independent guarantor for guaranteeing to the shareholders a certain dividend are not the profits of the company, the latter being merely the vehicle for handing over the guaranteed money to the share holders [7] But where there is no such outside guarantee profits received by a company in the course of its business even though held in trust for debenture holders, etc , are profits of the company [8]

Separated wife—Obligatory payments to—

Under an agreement between the assessee and his wife he had to pay her a weekly sum of £30 for her separate use during their joint lives *Held* that the payments could be deducted in computing the assessee's income for super tax purposes

(3) *Allan v Commissioners of Inland Revenue* 4 A T C 10

(4) 2 A T C 319

(5) 3 A T C 497

(6) *Trustees of Brennan Minors v Scanlan* 4 A T C 361

(7) *In re South Llanharran Colliery Co* 12 Ch D 503

(8) *Commissioners of Inland Revenue v City of Buenos Ayres Tramways*, 6 A T C 19

Per Rowlatt J—"Although he is separated he cannot deduct it if he is separated not on the terms of paying the money or if he is under no obligation to pay it but merely sends it because he thinks it is the right thing to do or for some other reason voluntarily sends it week by week. If he had not paid I do not think he could have defended an action for a moment if an action had been brought against him He would have been beaten He went on paying the money because he was legally compelled to do so and was under an obligation to do so Therefore he is entitled to deduct it" [9]

Partnership—Obligatory Reserve Fund—Not income of partners—

The assessee and his brother were partners in a business of which the property and goodwill had been bequeathed by their father's will upon trust for his two sons for life upon condition that they should enter into partnership In order to preserve the assets of the business the trustees under the will compelled the partners to enter into an agreement under which a certain percentage of the net profit of the business was to be set aside in each half year to create a reserve fund to meet any losses arising out of the business Subject to this condition the reserve fund remained the property of the partners *Held*, that the sum set aside was an annual payment reserved or charged upon the net profits of the partners whereby the income of each of the partners was diminished [10]

Lunacy percentage—

Lunacy percentage is a payment out of income of the lunatic *after* it becomes his income [11]

Trustees—Chargeable on full income—No deductions admissible—

Certain trustees who were in Scotland received remittances from trust property abroad and distributed the net income of the trust among the beneficiaries *Held*, that the full amount received in the United Kingdom was chargeable with income tax, without any deduction in respect of expenses incurred in the United Kingdom in managing the trust

Per the Lord President—It is for them (the trustees) to point to the section of the statutes which entitled them to make such a deduction I think they have entirely failed

Per Lord McLaren—The management of the trustees is really I venture to think of the nature of what is described in one of the rules as a private or domestic use the only kind of deductions allowed is expenditure incurred in earning the profits and there is no deduction under any circumstances allowable for expenditure incurred in managing profits which have been already earned and reduced into money—pounds shillings and pence [12]

(9) *Eadie v Commissioners of Inland Revenue* 9 Tax Cases 1
(10) *Stocker v Commissioners of Inland Revenue* 7 Tax Cases 304
(11) *Committee of A B v Simpson* 7 A T C 232
(12) *Aiken v Trustees of C W Macdonald*, 3 Tax Cases 306

Legacy Duty paid by trustees—Included in total income—

The assessee was entitled under a will to a share of the net annual income of the testator's residuary estate Legacy Duty was chargeable on the sums so payable from year to year, and was duly paid to the Crown by the trustees, who deducted it from their remittances to the assessee

Held that, although the trustees were primarily accountable for the Legacy Duty, it was, in effect, a personal obligation of the assessee, and that the income receivable under the bequest had been rightly included in the computation of his total income for the purposes of super tax in the full amount of his share of the net residuary income, *plus* the income tax applicable thereto, without deduction of the Legacy Duty paid by the trustees on his behalf [13]

Settled estate—Minor—Contingent interest—Accumulated income—

Under a will certain lands of the testator were subject to certain interests of the widow, to be held in trust for the eldest son living at the time of his death absolutely on his attaining the age of 21 years and the residue of the property both real and personal was to be converted into money and invested The capital and income of such investment was to be held in trust for all the children in equal shares and were "an interest or interests absolutely vested ' upon the testator s death Discretion was given to the trustees to apply the whole or part of the income to which any child was entitled to his or her maintenance and the balance was to be accumulated by investment There was only one son and three daughters The widow remarried and all that she became entitled to was an annuity from the residuary estate The son was sought to be assessed to super tax on the income from real property *plus* the one fourth share in the income of the residuary estate The important part of the Crown's case was that the interest of the minor was 'vested' and not 'contingent' and that therefore the Crown was entitled to tax the minor as though he had received the income in question

The decision on this point was as below

The first point which (counsel for the assessee) makes is that it does not matter whether the interest is vested or contingent because even assuming that this specific bequest is vested still inasmuch as there is a trust to accumulate a fund during the infancy of the eldest son subject to a power to the trustees to supply such sum as they think proper for his maintenance the part of the income which is accumulated is not the income of the minor It is a very important point but I have come to the conclusion that he is right It is perfectly true to say as (counsel for the Crown) did that

(13) *Colt le v Comm ss oners of Inland Revenue* 8 Tax Cases 44

in a case of that kind the income must come to the infant in the end if the interest which he takes is a vested interest, but in my judgment it will not come to him as income, it will come to him in future in the form of capital. It is income which is held in trust for him in *the sense that he will ultimately receive it but it is not in trust for him* in the sense that the trustees have to pay the income to him year by year while he is an infant. I think that view of the case is supported by *Inland Revenue Commissioners* v. *Wemyss*[14]. I think this case is quite different from a case where the infant has the right to the money now but where the money remains in the hands of his trustees not because of any directions in the will which directed it to be accumulated but because he is an infant and cannot receive the money and give a receipt for it and it therefore remains in the hands of his trustees being invested but lying ready for him waiting for the time when the infant can give a good receipt for it. I think the language that was used in the House of Lords in *Drummond* v. *Collins*[15] suggests that view. There are expressions which in my judgment point to this conclusion that it is only when the discretion of the trustees is exercised so as to give the infant a portion of the income which was being accumulated for them that the liability to income tax attaches. I find also material support for the view I take although the point would not come directly under discussion in *Williams* v. *Singer*[16]."

Against this the Crown appealed. The Court of Appeal remanded the case for a definite ruling as to whether on the construction of the will the minor's interest was in fact vested or contingent. Tomlin, J, held that it was contingent and this decision was upheld in the Court of Appeal. The question therefore as to what would have been the liability to tax if the interest had been vested was not settled by the Court of Appeal, and Rowlatt, J's view has neither been affirmed nor overruled[17].

By a will dated 1906 the testator, who died in 1908, gave the residue of his estate—which contained real property subject to heavy mortgages—after payment of certain legacies and annuities to certain servants and clerks, to his four children. Until the youngest child attained the age of 25 years—which was in 1916—the rents were to be used in reducing the mortgages, and then the property *was to be divided and not sold unless* the trustees thought it advisable. The rents were spent in reducing the mortgages even after 1916 and no legacies were paid before December, 1919. The Crown contended that the children became entitled to the corpus of their respective shares of the residuary estate with effect from 1916 and could have enforced the

(14) 8 Tax Cases 551
(15) 6 Tax Cases 525
(16) 7 Tax Cases 787
(17) *Commissioners of Inland Revenue* v. *Blackwell's Trustees* 10 Tax Cases 235

conveyance of such shares to themselves subject to charges The Crown chose to tax income since 1914 *Held*, that since it was open to the executors to pay off the mortgage debts—without the consent of the beneficiaries—before distributing the residue, and they chose that course, the residue had not been ascertained So no tax was payable[18]

Payments free of tax—Wills—Marriage settlements—Other contracts—

Under the English law there is an express provision, Rule 23, General Rules (all schedules), declaring that "every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction shall be void" This has been construed to mean that the agreement would be void only as regards the particular stipulation for the payment without deduction[19]

There is a very large number of English cases regarding the effect of provisions in wills, marriage settlements and other contracts that payments should be made 'free of income tax' The decisions are somewhat conflicting but the following general principles can be deduced Unlike other duties income tax is a personal tax, not a tax on an estate[20] Therefore the courts have generally held that all payments under such provisions are taxable in the hands of the recipient (by deduction at source) but if there is clear indication that the object of the testator or other person making the contract was to make the payment free of income tax the payment should be made free of such tax[21] A direction in general words such as a clear annuity' (*In re Loveless*), or 'free of all duties' (*In re Saillard*), or 'clear of all taxes and deduction'[22] is not enough, there must be either express provision that the income tax should be borne by the trustees and not by the legatee or provisions which will bear no doubt as to that having been the intention of the testator

If a will directs the payment of an annuity or other sum free of income tax the direction must be carried out[23]

'It is simply a matter of construction whether the testator has given the annuity together with a sum equal to the income tax

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(18) *C B Dau v Commissioners of Inland Revenue* *Duff Dunbar v Commissioners of Inland Revenue* 7 A T C 238 14 Tax Cases 58

(19) See *Gaskell v King* (1809) 11 East 165 *Bigg v Shuttleworth* (1810) 13 East 8 *Readshaw v Balders* (1811) 4 Taunt 57 *Fuller v Abbott* (1811) 4 Taunt 105, *Tinckler v Prentice* (1812) 4 Taunt 549

(20) See *Lethbridge v Thurlow* (1851) 15 Beav 334 and *Sadler v Richards*, (1858) 4 K and J 302

(21) See *Turner v Mullineux* (1861) 1 John and H 334, *Festing v Taylor*, (1862) 7 L T 499 *Abadam v Abadam* (1864) 33 Beav 475

(22) *Cleadow v Leetham*, (1882) 22 Ch D 269

(23) *Lovat (Lord) v Duchess of Leeds*, (1862) 31 L J Ch 503

to the annuitant so that the annuitant may receive the annuity free of tax or has simply given an annuity and left the annuitant to bear his own income tax'"[24]

It was also held in *Festing v Taylor*[25] that bequests free of income tax were not void as wills had not been referred to in section 103 of the 1842 Act (*corresponding to Rule 23, General Rules now*) and the omission could not be accidental This is due to the fact that under a will the parties "take their respective rights from the bounty or the forbearance of the testator" Even as regards non testamentary payments it has sometimes been held that contracts to pay free of tax are not void

See also the following cases —*Murdock's Trustees v Murdock and others*[27], *Smith's Trustees v Gaydon*[28], *Wilson's Trustees v Wilson*[29], *In re Loveless, Farrer v Loveless G A*[30], *In re Bowring, Wimble v Bowring*[31]

A bequest free of income tax is not free of super tax[32]

The above decisions will not apply to India in so far as the liability of the trustees to deduct tax at source is concerned Under sections 7 and 18 of the Indian Income tax Act, it is only annuities that are paid by Government, etc, or a private employer that can be taxed at source Annuities under wills can be taxed only under section 12, *i e*, by the Income tax Officer making an assessment on the annuitant, and his liability to tax will not be affected even though under the will he may be entitled to be reimbursed this tax from the estate, or if the payment is not under a will, from the person paying him the annuity

So many complicated cases have arisen in the United Kingdom because under the law there the trustee is taxed on the gross income and is authorised to recoup himself by deducting tax from the annuitant

Contracts—Free of tax—

Though there is no provision in the Indian Statute corresponding to Rule 23 of the English General Rules, it will apparently make no difference because under section 23 of the Indian Contract Act an agreement not to deduct tax where it has to be deducted *is not enforceable* *This, however, would not pre*

(24) Per Swinfen Eady, L J in *In re Sillard Prath v Gamble* (1917) 2 Ch. 401

(25) (1862) 3 B & S 217, 7 L T 429

(26) See *Brooke v Price* (1917) A C 115 (a settlement on dissolution of marriage) *Beadel v Pitt* (1865) 11 L T 592 (lease)

(27) (1918) 55 Sc L R 664

(28) (1918) 56 Sc L R 99

(29) (1919) 56 Sc L R 256

(30) (1918) 2 Ch. 1

(31) (1918) W N 265

(32) See *In re Crawshay Crawshay v Crawshay* (1915) W N 419, also *In re Bates, Selmes v Bates*, 4 A T C 518

vent a person so contracting as to pay the other party so much as would after deduction of tax leave him a specified net amount That is, the consideration for the contract would be the gross amount[33]

CAPITAL AND INCOME

The tax is on income, profits and gains and not on capital. Capital receipts would be exempt under 4 (3) (vii) as they would *ex hypothesi* be casual and non recurring nor could they be "income, profits or gains" even if they arose out of business or the exercise of a profession, vocation or occupation

In this respect, *viz*, that of taxing 'income, profits and gains' and not 'capital' there is no difference between the Indian law and the English "Income tax is a tax on income"[34]

"I think it cannot be doubted upon the language and the whole purpose and meaning of the Income tax Acts that it never was intended to tax capital as income at all events"[35]

Similarly the law does not permit losses or expenditure of a capital nature to be deducted from taxable income or profits —*see* sections 9 to 13

As to what constitutes the distinction between capital and income, it is almost impossible to give a satisfactory definition As Pollock, M R, said—

"What is capital and what is attributable to revenue account I suppose is a puzzling question to many accountants and I do not suppose that it is possible to lay down any satisfactory definition

"Whether something is income or not is *prima facie* a question of fact and not of law for, after all the distinction between income and capital is one of convenience and there is no real substance in it" Per *the Lord President in I D Laird v C I R*[36]

Income—

"Income" signifies "what comes in"[37] "It is as large a word as can be used" to denote a person's receipts[38]

A person's "income"—even "total income from all sources", S 8, 39 Vd, 16,—means, money, or money's worth, received by him and (in this connection, at least) money's worth must be something that "can be turned into money"[39] the tax, whether

(33) See *North British Railway Co v Scott* 8 Tax Cases 332 and *Hartland v Diggines* 10 Tax Cases 247 *South American Stores v Commissioners of Inland Revenue*, 12 Tax Cases 905

(34) Per Lord Macnaghten—*London County Council v Attorney General*, 4 Tax Cases 265

(35) Per the Earl of Halsbury in *Secretary of State for India v Scoble* 4 Tax Cases 618

(36) 7 A T C 42.

(37) Per Selborne L C—*Jones v Ogle* 4 L J Ch 336

(38) Per Jessel M R—*Re Higgins* 51 L J Ch 938

(39) Per Halsbury, C—*Tennant v Smith*, (1892) A C 150

under Schedule D or E, is, "not on what saves a person's pocket but, *on what goes into his pocket*" (per *Lord Macnaghten Ib.*) Therefore, an employee, though of so superior a character as a Bank Manager, who as part of the terms of his employment has to reside on his employer's premises, which residence he gets rent free but cannot sub let or turn to pecuniary account, does not thereby get any addition to his income, any more than does the Master of a Ship who is spared the cost of house rent while afloat.[40] It may be a gain to him, in the popular sense of the word but it is not "profits or gains," as that phrase is used in Schedule D, nor is it "Salaries, Fees, Wages, Perquisites, or Profits" within Rule 1, Schedule E, nor is it "Profits, Gains, or Emoluments," within Rule 2, Case 3, Schedule D, or "Perquisites from Fees or other Emoluments," within Rule 4, Schedule E (*Ib.*) V. Income tax (Stroud) (But this decision does not apply in its entirety to India—*see* section 7.)

'Profits' and "income" are sometimes used as synonyms but, strictly speaking, "income" means that which comes in without reference to the outgoings, whilst "profits" generally means the gain which is made when both receipts and payments are taken into account.[41]

Extraordinary profits of a company are "income" or "capital" according to the way in which the Company (acting within its powers) deals with them, if they are distributed as a dividend, they are income.[42] If properly used for creating new shares, they are "Capital".[43] (Stroud.)

These decisions about 'capital' and 'income' however cannot be applied in their entirety to Income tax matters. The distinction between capital and income for the purpose of other Acts, *e.g.*, the Companies Act, is not always—though it is ordinarily—the same as the distinction for purposes of income tax. Similarly the decision in *Tennant v. Smith* referred to above though relating to income tax will not apply in its entirety under the present Indian law.

Per Fletcher Moulton, L. J.—The word profits has in my opinion a well defined legal meaning and this meaning coincides with the fundamental conception of profits in general parlance although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. Profits implies comparison between the state

(40) *Tennant v. Smith* (1892) A. C. 150.
(41) *People v. Niagara Supervisors* 4 Hill 23.
(42) *Re Alsbury, Sugden v. Alsbury* 45 Ch. D. 237.
(43) *Bouch v. Sproule* 12 App. Cas. 385. *See Re Northage* 60 L. J. Ch. 488. *Ib.*, *Re Paget* 9 Times Re. 88, *Re Malam*, (1894) 3 Ch. 578, *Re Armitage*, (1893) Ch. 337.

of a business at two specific dates usually separated by an interval of a year The fundamental meaning is the amount of gain made by the business during the year This can only be ascertained by a comparison of the assets of the business at the two dates For practical purposes these assets in calculating profits must be valued and not merely enumerated A depreciation in value, whether from physical or commercial causes, which affects their realizable value is in truth a business loss But though there is a wide field for variation of practice in these estimations of profits in the domestic documents of a firm or a company this liberty ceases at once when the rights of third persons intervene For instance the revenue has a right to a certain percentage of the profits of a company by way of income tax The actual profit and loss accounts of the company do not in any way bind the Crown in arriving at the tax to be paid "[44]

This was not an Income tax case The question of applying the principle of the ruling to such cases was examined and negatived by all the three Courts in *Natal Colliery, Ltd* v *Inland Revenue* [44a]

Gains—

"Although in the Income tax Act 1842 (Schedule D and section 100) 'profits' and gains are really equivalent terms yet the use of the word 'gains' in addition to the word profits' furnishes an additional argument for excluding the contention that you are to introduce into the word 'profits some ideas connected not with the nature of the thing but, with the manner and rule of its application What are the 'gains' of a trade? If it could be reasonably contended that the word profits' in these (Income tax) Acts has reference to some advantage which the persons carrying on the concern are to derive from it it might be said perhaps, that the same argument might have been raised upon the word 'gains' but to my mind it is reasonably plain that the gains' of a trade are that which is gained by the trading for whatever purpose it is used, whether it is gained for the benefit of a community or for the benefit of individuals "[45]

Capital—

'I think the word capital itself rather points to something which is to be in its application to a source, I will not say of invested income but a source of income not merely by way of loan, I do not know how to express it better the construction may be too refined but it seems to me you would not expect such language to be used with reference to a temporary deposit in a bank. '[46]

The emphasis, it will be seen, is on the *temporary* nature of the deposit The above dictum refers to a case under the English law under which income from land in the shape of fines on renewal of leases is exempt from tax if used as productive capital

(44) In re *Spanish Prospecting Co Ltd* (1911) 1 Ch 92

(44-a) 12 Tax Cases 107

(45) Per the Lord Chancellor—*Mersey Docks* v *Lucas* 2 Tax Cases 29

(46) Per Wright J, in *Lord Mostyn* v *London*, 3 Tax Cases 294

"There is nothing to show that that word should bear a different meaning in the Income tax Acts (from that in the Companies Acts) when applied to the proceedings of Joint Stock Companies"[47]

Income—

'Without giving an exhaustive definition it may be described as the annual or periodical yield in money or reducible to money value arising from the use of real or personal property or from labour or services rendered bearing in mind that in some cases *e g* income derived from house property the yield must be taken as the *bona fide* annual value and not necessarily as the actual yield'[48]

Profits—

Should be understood in its natural and proper sense in a sense which no commercial man would misunderstand[49]

U S A—

The same difficulty has been felt in the U S A As one writer says

'What is needed is an authoritative definition of 'income' It cannot be found in the Supreme Court decisions because there are too many differentiations and limitations to make it at all clear what a decision will be in any future case" Another defines 'income' as "the money value of the net accretion to one's economic power between two points of time" This of course will not fit in with the Indian or the English law neither of which taxes the appreciation of capital values—whether realised or not

The meaning of that word (income) is not to be found in its bare etymological derivation Its meaning is rather to be gathered from the implicit assumptions of its use in common speech The implied distinction it seems to us is between permanent sources of wealth and more or less periodic earnings Of course the term is not limited to earnings from economic capital *i e*, wealth industrially employed in permanent form It includes the earnings from a calling as well as interest royalties or dividends yet the word unquestionably imports at least so it seems to us the current distinction between what is commonly treated as the increase or increment from the exercise of some economically productive power of one sort or another and the power itself and it should not include such wealth as is honestly appropriated to what would customarily be regarded as the capital of the corporation taxed"[50]

The above decision *U S v Oregon—Washington* (New York) was given in a case in which it was held that a gift to a corporation was not taxable income

(47) Per Lord Atkinson in *Scottish North American Trust v Farmer*, 5 Tax Cases 693

(48) Per Dawson Miller C J, in In re *Raja Jyoti Prashad Singh Deo*, 1 I T C 303

(49) Per Halsbury, L C, in *Gresham Life Assurance Society v Styles* 3 Tax Cases 185

(50) *R & Nav Co* 251 Fed 211

In *Macomber* v *Eisner*,[1 2]

Pitney, C J, said "Enrichment through increase in value of capital investment is not income in any proper meaning of the term that is, if unrealised by the persons who are taxed Again after examining dictionaries in common use (Bouve L D Standard Dictionary, Webster's International Dictionary Century Dictionary) we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909[3] "Income may be defined as the gain derived from capital from labour or from both combined" provided it be understood to include profit gained through a sale or conversion of capital assets to which it was applied in the Doyle case '

The difference between the U S law on the one hand and the English and the Indian on the other in this particular respect is chiefly the taxation of appreciation of capital values in certain circumstances in the U S A

The decisions that have been set out below refer to capital *receipts* The decisions about capital *expenditure* have been set out under section 10 (2) (ix) which prohibits the deduction of capital expenditure from taxable profits

As regards Capital Receipts, *see also* the decisions that have been set out under 'Business'—section 2 (4), and Casual Receipts—section 4 (3) (vii) These subjects overlap

Bonus Shares—

In *Bouch* v *Sproule*[4] a testator bequeathed his residuary estate in trust for his wife for life and after her death to some one else absolutely Part of the residue constituted shares in a company whose directors had power before recommending a dividend to set apart out of the profits such sum as they thought proper as reserve fund for certain purposes On the recommendation of the directors the company by special resolution passed a new article empowering the directors with the sanction of the company in a general meeting afterwards given to declare a bonus to be paid to the shareholders out of the reserve fund with its profits so enlarged or out of any other accumulated profits in proportion to their shares The directors allotted to each shareholder new shares in proportion to his existing holdings, crediting the amount taken from the reserve fund as paid upon the new shares It was held that the allocation by the company was in substance not a distribution of profits but a capitalisation thereof.

Per *Lord Justice Fry* in the Court of Appeal—

' When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the

(1 2) 252 U S 189

(3) *Stratton s Independence* v *Howbert* 231 U S 399, 415, *Doyle* v *Mitchell Bros Co*, 247 U S 179, 185

(4) 12 A C 385

power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life and what is paid by the company to the shareholder as capital or appropriated as an increase of the capital stock of the concern enures to the benefit of all who are interested in the capital '

cited with approval by Lords Herschell and Watson in the House of Lords who confirmed the decision

In In re *Taylor, Waters* v *Taylor*,[5] following *Bouch* v *Sproule*[6] and In re *Evans*,[7] it was held that in deciding questions of capital and income as between remaindermen and life tenants the intention of the company should be regarded Did it intend to capitalize? Reference should be had to substance and not to form The fact that in form option is given to the shareholder does not necessarily decide that the bonus shares are income and not capital

Similarly in In re *Bates, Mountain* v *Bates*,[8] in which a company sold assets at favourable prices and carried the difference between this and the book value to suspense and gave cash bonuses to shareholders with a covering letter that the bonuses were capital payments not liable to income tax or super tax, it was held as between remainderman and life tenant that no bonus shares having been issued the payments were income and not capital

Though *Bouch* v *Sproule* was not a Revenue decision but one relating to the rights of a tenant for life and the remainderman, the general principle underlying it, *viz*, that if a company validly capitalises its profits, its action is valid as against the outside world was considered in *Commissioners of Inland Revenue* v *Blott*[9] *infra* to extend to Revenue matters also

In the *Swan Brewery Company* v *The King*,[10] however, it was held under an Act of West Australia which specially defined 'dividend' as including "every dividend, profit, advantage or gain intended to be paid or credited to or distributed among any members or directors of any company except the salary or other ordinary remuneration of directors" that bonus shares issued out of undivided profits were taxable as income, that is to say,

(5) (1926) Ch 923
(6) (1887) 12 A C 385
(7) (1913) 1 Ch 23
(8) (1928) Ch 683
(9) 8 Tax Cases 101
(10) (1914) A C 231

the company had in effect declared a dividend within the meaning of the Act equal to the nominal amount of the new shares

But this decision was not followed by the House of Lords in *Commissioners of Inland Revenue v Blott*, though Lord Sumner who delivered the judgment of the Privy Council in the *Swan Brewery case* and also sat in the House of Lords in the *Blott case* considered that the decision of the Privy Council did *not* turn on the special definition of 'dividend in the taxing statute of West Australia

Bonus Shares—In same company—Not income—

The assessee was a shareholder in a Limited Company, which under the authority of its Articles of Association had declared a bonus out of its undivided profits and in satisfaction of such bonus, had allotted to its shareholders as fully paid up certain ordinary shares forming part of the company s author ized but unissued capital The shareholders had no option to receive cash in lieu of shares in satisfaction of the bonus *Held* (Lords Dunedin and Sumner dissenting) that the shares credited to the respondent in respect of the bonus being distributed by the company as capital were not income in the hands of the assessee

The money so applied is capital and never becomes profit in the hands of the shareholder at all What the latter gets is no doubt a valu able thing But it is a thing in the nature of an extra share certificate in the company His new shares do not give him an immediate right to a larger amount of the existing assets These remain where they were The new shares simply confer a title to a larger proportion of the surplus assets if and when a general distribution takes place as in the winding up A share holder is not entitled to claim that the compan should apply its undivided profits in payment to him of dividend Whether it must do so or not is a matter of internal management to be decided by the majority of the shareholders He cannot sue for such a dividend until he has been given a special title by its declaration Until then no doubt the profits are profits in the hands of the company until it has properly disposed of them and it is assessable for income tax in respect of these profits But if acting within its powers it disposes of these profits by converting them into capital instead of paying them over to the share holders that as I conceive it is conclusive as against all the outside world including the Crown and the form of the benefit which the share holder receives from the money in the hands of the company is one which is for determination by the company alone —Per *Lord Haldane*

As the capital was increased it might reasonably be expected that the profits of the company would be increased and that the shareholders would benefit in this way but their relative shares in the undertaking remained the same The use of the sums which had been available for dividend to increase capital would enable the company to carry on a larger and more profitable business which might be expected

to yield larger dividends These dividends, however, were to be in the future So far as the present was concerned there was no dividend out of the accumulated profits these were devoted to increasing the capital of the company The company had power to do what it pleased with any profits which it might make It might spend the accumulated profits in the improvement of the company's works and buildings and machinery. These improvements might lead to a great accession of business and increase of profits by which every shareholder would benefit, but of course it could not for a moment be contended that such a benefit would render him liable to super tax in respect of it The benefit would not be in the nature of income and super tax can be levied only on income It would be so levied on the dividends afterwards received

The benefit, and the sole benefit which the assessee derived, was that the business in which he had a share was a larger one with more capital embarked in it, precisely as might have been the case if the accumulated profits had been applied in the improvement of the company's works and machinery The preference shares are in themselves valueless '—Per *Lord Finlay*

The transaction took nothing out of the company's coffers, and put nothing into the shareholders' pockets and the only result was that the company, which before the resolution could have distributed the profit by way of dividend or carried it temporarily to reserve, came thenceforth under an obligation to retain it permanently as capital It is true that the shareholder could sell his bonus shares, but in that case he would be realising a capital asset producing income, and the proceeds would not be income in his hands It appears to me that if the substance and not the form of the transaction is looked to, the declaration of a bonus was as Mr Justice Rowlatt said 'bare machinery'' for capitalising profits and there was no distribution of profits to the shareholders ''—Per *Lord Cave*

It takes two to make a paid up share A share issued is a share to be paid for, paid for by the allottee in meal or in malt in money unless by contract between himself and the company he is enabled to satisfy his obligation to pay by some other consideration moving from himself to the company Under the contract in question, what consideration so moves from the shareholders? None that I can see, except the discharge of the company's debt for a dividend, which has become due to him by being declared When debt for dividend is set off against debt for calls and the account is squared, the equivalent of payment of a dividend takes place If the word 'bonus' has some effect to the contrary then no consideration has moved from the shareholder and his shares are not fully paid The company can choose whether it will divide its profits in meal or in malt, if it decides to divide otherwise than in cash a contract to accept something in lieu of cash operates nothing for no right to cash has accrued A contract to accept shares in satisfaction instead of cash implies, first a declaration which gives the right that has to be satisfied, and second a satisfaction of that right, which is equivalent to payment . . . It is just as reasonable to call the shares allotted ''mere 'machinery'' for wrapping up a distribution of

profits as to call bonus shares "mere machinery' for effecting distribution of capital "—Per *Lord Sumner* (dissenting) [10a]

Bonus Shares—Of other Company—

The assessee company which was registered and carried on business in England as an Investment Trust Company owned a number of common shares of $100 each in the Union Pacific Railroad Company It was held by the Supreme Court of the United States that the Union Pacific Railroad Company, an American Company, had so invested its accumulated reserve funds as to contravene the Sherman Anti Trust Statute The company was required by the Court to dispose of its entire holding of Common Stock of the Southern Pacific Railway Company in such a manner as to terminate the control of that company by the Union Pacific Railroad Company An arrangement for this purpose received the approval of the Court, and was carried into effect, under which a portion of the said holding of Southern Pacific Railway Company's Common Stock was transferred to the Pennsylvania Railroad Company in exchange for holdings of Preferred Stock and Common Stock in the Baltimore and Ohio Railroad Company, and the remainder of the holding was sold for cash The Union Pacific Railroad Company thereupon distributed a substantial portion of its accumulated surplus funds, and declared an Extra Dividend on its Common Stock, to be satisfied by the distribution to the holder of each $100 share of $12 (par value) Preference Stock and $22 50 (par value) Common Stock in the Baltimore and Ohio Railroad Company and $3 00 in cash At the same time the Company announced its intention to reduce the regular rate of dividends on its Common Stock from 10 per cent, at which for many years it had stood to 8 per cent, but *explained that the annual income derivable* from the Stock, etc, comprising the Extra Dividend would compensate approximately for the reduction of 2 per cent in the rate of dividend

The assessee company duly received certain Common Stock and Preference Stock in the Baltimore and Ohio Railroad Company, together with a payment in cash in respect of the Extra Dividend on its holding of common stock in the Union Pacific Railroad Company, and it sold the stocks included in such Extra Dividend for £1,086 19 6 and credited the proceeds to capital account in its books

Held, that in the payment of the Extra Dividend there was a distribution not of capital assets but of assets which were

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(10-a) *Commissioners of Inland Revenue v Blott*, 8 Tax Cases 101

profits or gains in respect of which the assessee company was chargeable with income-tax.[11]

Per *Sankey, J*—Now there have been many decisions chiefly in connection with the winding up of companies, or the interpretation of wills, where the difference between income, capital and accumulated profits has been discussed and dealt with, and there are undoubtedly some where it has been held that by reason of the facts accumulated profits have been transmuted into capital For example in the *Bridgwater Navigation Company*[12], in the *Spanish Prospecting Company, Limited*[13], *Andrew v Thomas*[14], it was held that accumulated profits had not been impressed with the character of, or become, capital In *Bouch v. Sproule*[15] it was held they had.

As Lord Finlay says in *Blott's case*[16]—"The case differs *toto caelo* from a case in which a dividend is paid not in money but in money's worth by the delivery, say, of goods or securities" If there has been no release of assets there has been no distribution and there is nothing to tax neither is there anything to tax if the release is the distribution of capital The case of Blott was so decided because the majority of the Members of the House of Lords were of opinion that there had been no release of assets The company in fact kept the assets in respect of, and distributed previously unissued capital Similarly in the case *Bouch v Sproule*[15] the company kept the accumulated profits and allotted new shares (partly paid up) in respect thereof . .

In my view the true test as to whether a distribution of shares falls to be taxed depends upon two questions —(1) Whether there has been a release of assets, and (2) if so, whether the assets released were capital or income

As to (1) —In the present case there has been a release of assets within the meaning of the words as used by the majority of the Law Lords in Blott's case As to (2) —I doubt if it is possible, I am sure it is not desirable, to lay down in answer to the second question any general rule for future guidance

The matter appears to be free from authority in England, but it has already been decided in the Supreme Court of the United States where the principles of law to be applied in this respect do not differ, in my view from our own In the case of *Peabody v Eisner*[17] it was held that a dividend by a Corporation of shares owned by it in another Corporation is not a stock dividend and is subject to the tax like an equivalent distribution of money By a stock dividend is meant a dividend paid in the company's own stock which, as the Court pointed out, in fact took nothing from the property of the Corporation and added nothing to the interest of the shareholder, but merely changed the evidence which represented this interest

(11) *Pool v Guardian Investment, etc.,* 8 Tax Cases 167
(12) (1891) 2 Ch 317
(13) (1911) 1 Ch. 92
(14) (1916) 2 Ch 331.
(15) (1887) 12 A. C 385
(16) 8 Tax Cases 101
(17) (1917) 247 U S Reports 347

Later on the whole matter was discussed and it was decided in *Eisner v. Macomber*[18] that mere growth or increment of value in a capital investment is not income income is essentially a gain or profit in itself of exchangeable value, proceeding from capital, severed from it and received by the tax payer for his separate use, benefit and disposal, and that a stock dividend evidencing merely a transfer of an accumulated surplus to the capital account of the Corporation takes nothing from the property of the Corporation and adds nothing to that of the shareholder and a tax on such dividend is a tax on capital increase

As Mr Justice Pitney points out in giving the judgment of the Supreme Court of the United States, at page 206 of the Report, the fundamental relation of capital to income has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop—the former depicted as a reservoir supplied from springs the latter as the outlet stream to be measured by its flow during a period of time He cites on the subsequent page various definitions, one of which was that income may be defined as the gain derived from capital, from labour or from both combined, and points out that the essential matter is that income is not a gain accruing to capital but a gain derived from capital

Applying the metaphor of a reservoir to *Blott's Case*[19] the facts found therein may be stated as follows —From the reservoir of capital certain proceeds were allowed to flow down the outlet stream but these proceeds were not allowed to reach the shareholder, the company enlarged the area of the reservoir and put back the proceeds into the enlarged reservoir—in other words the proceeds in that case never became the profit or gain or income of the shareholder, but were put back into the capital of the company and the unissued shares issued to the shareholder in respect thereof

Now in the present case just the opposite has happened

The proceeds have been allowed to flow down the outlet stream, but they have not been put back into capital They have been allowed to reach the shareholder in the form of a cash payment and a dividend in specie of the shares of another company, or, as Lord Halsbury put it in the case of *Tennant v Smith*[20] "There has been a distribution of money and of money's worth" I am far from saying that there can never be a distribution of capital to the shareholders of the company There might certainly be such a distribution in the case of the voluntary winding up of a company and the division of its capital assets among the shareholders but in the present case, I am entirely unable to say that there was any distribution of capital as distinguished from profits or gains I again repeat the words of Lord Finlay in *Blott's Case*[21] where he said that that "case differed *toto caelo* from a case in which a dividend is paid not in money, but in money's worth by the delivery say, of goods or of securities," or as Mr Justice Pitney in Macomber's case says, at

(18) (1919) 252 U S Reports 189
(19) 8 Tax Cases 101
(20) 3 Tax Cases 158
(21) 8 Tax Cases 101

page 215 — The reliance upon the supposed analogy between a dividend of the Corporation s own shares and one made by the distribution of shares owned by it in the stock of another company calls for no comment beyond the statement that the latter distributes assets of the company among the shareholders while the former does not

In the present case there has been as above stated a distribution of assets and for the reasons that I have endeavoured to give in my view those assets were *not capital assets* but were *profits or gains* and are taxable under the Income tax Act

The so called dividend was severed from the capital was not added to it and never became part of it but was received by the company for its separate use benefit and disposal"[2]

This decision was quoted with approval by the House of Lords in *Commissioners of Inland Revenue v Executors of Bishop Fisher* [3]

For an exposition of the question how far bonus shares or stock dividends as they are called in America can be 'income' *see also* an article by Professor Seligman in the American Economic Review September 1919 which *generally supports* the views of the Supreme Court in the case of *Fisher v Macomber* referred to above

Bonus—Debentures—Same company—Not Income—

A company distributed its undivided profits in the shape of debentures—a portion of which were to be exchanged for fully paid preference shares *Held* by the House of Lords affirming the decision of the Court of Appeal (reversing the decision of Rowlatt J) that these debentures were not income in the hands of the shareholders

The judgment of Lord Sumner (who was in the minority in *Blott Case*) sets out the *ratio decidendi* very clearly

Shortly stated I understand that *Blott's Case* was decided on this principle To attract super tax to a bonus distributed to him by a company in which he is a shareholder what reaches the tax payer must at that moment bear the character of income impressed upon it by the Company which distributes it and by it alone Provided that the Company violates no statute and also keeps within its articles it can call the subject matter of the distribution what it likes and I think this involves the corollary that it can either call it by a new name or simply discard its old one After all it is natural for the creature to be named by its creator Further what the company says it is that it is as against all the world What the company says it shall no longer be that it is no longer for any purpose How this is effected and by what resolutions confirmations and instruments does not matter for such things are bare

(2) *A F Pool v Guardian Investment Trust Company Limited* 8 Tax Cases 16

(3) 10 Tax Cases 302

machinery." In what the company has said and done is found the answer to the question What has the subject-matter of the distribution now become or ceased to be, when first it reaches the tax-payer?[24 25] Transmuted by this alchemy, profits in hard earned gold became extra share-certificates, and yet the shareholders, who receive them, may be greatly the gainers

Both cases are alike in the following respects In both the company had among its assets considerable amounts of undivided profits and its board proposed to distribute among its shareholders shares of stocks of an aggregate face value corresponding to the amount of the undivided profits, which were to be dealt with The company passed a resolution to distribute a bonus in the form in the one case of preference shares, part of an authorised but as yet unissued amount, and in the other of debenture stock, newly created for the purpose In the former case the shares were to be credited as fully paid and, as between the company and the shareholders, the shares distributed carried no liability for calls but enjoyed a full right to participation upon the footing that they were paid up In truth, however, nothing was paid up on the shares, though alterations in the books and balance sheet were made as required. In the latter case the company executed a trust deed in which a large indebtedness was acknowledged to exist, which in truth was purely voluntary, for the company had borrowed nothing and owed nothing to the trustees, and the deed included a covenant to pay off that indebtedness at a future time To authorise the creation of this stock an amendment had to be made in Articles 42 and 43 Under the heading "borrowing powers," these were originally directed to borrowing money and to securing money borrowed By this amendment they were extended to securing the payment of sums of money and securing the repayment by an issue of debenture stock I assume, without deciding, that this amendment authorised what was done, since the Crown has not contested the point, though, even after the amendment, borrowing continues to be the salient and perhaps the pervading feature of the articles In neither case were any assets "released"[26], they remained in the business just as before In each case the advantage, which the company got by what was done, was simply this, that money, which might have been distributed at any time as dividend under ordinary resolutions declaring a dividend and authorising its payment, could no longer be dispersed in this simple way, but, if at all, only by more complicated resolutions duly passed by the shareholders and in *Blott's Case* probably involving liquidation. Were there an antagonism in interest between a company and its share holders, there might be some intrinsic advantage in such a change, but otherwise the object of it must in *Blott's Case be sought in some conflict* of view between different bodies of shareholders as to the extent of the conservation of assets to be adopted by the company and in the present case also in some private liability affecting some of the shareholders but not the company As a matter of fact, if the sum, in respect of which the

(24 25) See *Viscount Haldane*, pp 182, 184, 188 and *Viscount Finlay*, pp 194, 196, 197 of 1921 2 A C

(26) *Pool's case*, (1922) 1 K B 357, 8 Tax Cases 167.

debenture stock was issued in this case, had been distributed as cash dividends, nearly the whole of the ordinary shareholders would have been chargeable with super tax in the following year, and some of them in large amounts To the company this mattered nothing, but I cannot think it was lost sight of in the transactions in question

In both cases the resolution with which the transaction began spoke of capitalising" the undivided profits and distributing the sum dealt with as a "bonus," and in both cases the use of the word "dividend ' was carefully avoided It was submitted to your Lordships, as the essence of the decision in *Blott's Case*, that assets consisting of profits earned but not divided were to be turned into authorised share capital and that if so, the decision would not apply in the present case, where no alteration was made in the share capital I am unable to accept the first reply suggested by the respondents, that the sum actually was turned into capital, namely, loan capital, since it is clear that no such addition to effective capital, as arises when a company borrows a large sum on the security of its assets, was brought into existence at all, and I do not myself think that debts or promises to pay form part of capital, though some debtors do The second reply was very different, namely, that it was natural to speak of ' capitalising" and "converting" into capital in *Blott s Case* for there a purported "capitalisation" took place, but these expressions ought not to be read as limiting the *ratio decidendi* to cases, where new paid up capital is created in the strict sense of the word The real application of the principle is to assets, from which any further character of divisible profits has been taken away, whatever may be the substituted character thereafter impressed upon them If so, that principle applies here My Lords, for my part I think this argument is right and to hold otherwise would be disloyal to the former decision of your Lordship's House

There are also expressions in *Bouch* v *Sproule* and in *Blott's Case* which direct attention to the ' substance" of the company's transaction, but I do not think these affect the present appeal either *Lord Herschell*[27] speaks of looking at 'both the substance and the form", so does Lord Finlay in *Blott's Case*[28] Lord Cave, on the other hand, uses the expression [29] If the substance and not the form of the transaction is looked to ' In both cases however, both the form and substance were fully considered Not only were the deeds and resolutions construed but the scheme of the transaction its financial results, and the supposed desires and intentions of the company were examined Lord Finlay speaks of the option which was given to the shareholder in *Bouch* v *Sproule*, as one which should be ignored because it was merely formal[28] Lord Cave speaks of that option as at least so substantial that it might make a difference and as a feature not occurring in *Blott's Case* (p 202) In spite however of these discussions and divergences all the noble and learned Lords who formed the majority, refused to be influenced by the fact that to call the shares "paid up" was formally untrue, on the

(27) 12 A C 398
(28) (1921) 2 A C 198
(29) (1921) 2 A C 201.

ground that the form of transferring the required sum from the category of undivided profits to that of paid up share capital had been correctly gone through in accordance with the articles

Accordingly I think the present case *cannot* be distinguished on this ground The proposition that the substance of a transaction must be looked to and not merely the form, is generally invoked against those who have carried it out I think it is unusual, where the form of a transaction is against those whose transaction it is to invoke the substance in their favour, in order to eke out what they have left defective in form Sometimes, again, it is the "intention" of the company that is said to be dominant,[30] sometimes it is what the company "desired" to do[31] In any case desires and intentions are things of which a company is incapable These are the mental operations of its shareholders and officers The only intention that the company has is *such as* is expressed in or necessarily follows from its proceedings It is hardly a paradox to say that the form of a company's resolutions and *instruments* is their substance At any rate, in the present case there is no need to distinguish between form and substance in the transaction itself or to refer to desires or intentions, further than to examine what was *done*, for everything was carried out in plain terms and without concealment What the requisite majorities of the shareholders desired and intended is pretty plain, too but that is another matter

Equally must the Crown fail in its contention that the shareholder is taxable, because at any rate the company distributed money's worth, namely, debenture stock that could be sold The point was before the House in *Blott's Case* Lord Haldane (p 184) said that the share distributed to the shareholder was "valuable", and Lord Finlay (p 196) that it was "valueless", but this difference of opinion made no difference in their conclusion Lord Cave (p 199) expressly deals with it saying that the shareholder no doubt got something which he could sell, but if he did so he would be selling a capital asset, producing income (p 200) The fact is that money's worth is not a material circumstance until the bonus distributed has been shown when still in the company's hands and at the time of distribution to be impressed with the character of income of the company If it is not, the bonus does not attract tax as part of super tax payer's income, even though he spends it, when he gets it, exactly as he spends his taxable income

My Lords, the highest authorities have always recognised that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown, so far as he can do so within the law, and that he may legitimately claim the advantage of any express terms or of any omissions that he can find in his favour in taxing Acts In so doing, he neither comes under liability nor incurs blame It may be a question however, whether these considerations of justice and public policy apply equally to a limited liability company, a creature of the law strictly controlled by statute, in a case where it has no interest in either payment of or escape from a tax that is not levied upon it In this case a sum of £64,464 5,

(30) *Burrell's Case*, (1924) 2 K B 68
(31) (1921) 2 A C 200

part of the profits of the current year 1914 has been dealt with apart from the undivided accumulations an amount sufficient in itself to have paid a dividend on the issued ordinary shares of 25 per cent or 5s in the pound for every pound paid up and by the use of 'mere machinery' it has been converted into debenture stock not redeemable under normal circumstances for six years certain This is valid as against all the world, because *Bouch v Sproule* now applies to revenue cases and because under *Blott s Case* the mere decision of the company operating through voting majorities whose private motives and interests may have been no concern of the company at all has this effect If any part of the dividends of the year can be so converted I presume all could be nor, if a six years' currency of the debenture stock is permissible, do I see why six weeks should be less so How far this position is tolerable is however, a matter for the Legislature It is not material here but I think it may well be doubted whether in the long run it should be permissible for a limited liability company to create obligations for which no consideration has been given to it or to increase its paid up share capital out of its own assets without imposing on the holders of this additional share capital the usual obligations which are involved in the subscription of shares[32]"

Bonus—Debentures in the same company—Not taxable—

Mr. Whitmore owned the whole of the ordinary capital and he and his wife the bulk of the preference capital in Whitmores, Ltd, the rest of the shares being held by their close relatives The company had a large accumulation of undivided profits which it distributed partly as paid up shares in the company and partly as debentures Following *Blott's Case* the shares were not taxed but the debentures were taxed by the Revenue *Held*, following *Fisher's Case*, that the value of the debentures was not taxable[33]

Per Rowlatt J—He has not received a payment of the debt but he has become an acknowledged creditor a secured creditor, instead of having an interest in the profits the Court of Appeal have held that for the purposes of a payment of this kind capital is to include loan capital in the application in *Blott's Case*[34] It is said (by the Crown) that *Fisher's Case*[35] is distinguishable because there, as in *Blott s Case* the indications were that the company wanted to keep the money Here the company merely wanted to turn it into debenture capital for a span and then pay off the debenture capital soon Now having regard to the two limbs in the decision in *Fisher's Case* so clearly stressed by Lord Justice Scrutton I do not think it is possible to find any distinction on a consideration of the kind

The following dictum of Rowlatt, J is of importance

(32) *Commissioners of Inland Revenue v Execrs of Pt Pet Fisher* 10 Tax Cases 302

(33) *Whitmore v Commissioners Inland Revenue* 5 A T C 1

(34) 8 Tax Cases 101

(35) 10 Tax Cases 302

"It has not been argued before me that it was a finding (of the Commissioners) that these debentures were fictitious, were mere pieces of paper shown to the Inland Revenue and that the real transaction was that the profits were to be distributed in cash at any early date If what is meant is that the company adopted this transaction, being a real transaction, and one which does not make the shareholder liable to super tax in lieu of another transaction which would have made him liable that circumstance has no materiality as many cases show, in a contest of this kind "

Bonus shares—Option to receive cash—

In *Wright* v *Inland Revenue Commissioners*[36] bonus shares were issued and the shareholders given the option of receiving either cash or shares The assessee exercised the option in part and received a certain number of shares and certain amount of cash *Held* (by the Court of Appeal reversing the decision of Rowlatt, J) that the existence of the option did not affect the nature of the bonus which had been capitalised by the company In *Bouch* v *Sproule*[37] also there was an option though it was not exercised That decision having been followed in *Blott's* and *Fisher's Cases,* the existence of the option could not in *Wright's Case* make the bonus "income" The Master of the Rolls said· "We have to treat the company as dominant for all purposes "

Bonus shares—Issue of, to employees—

The underlying principle in *Bouch* v *Sproule and Blott's Case* is that, even though shareholders may have been given the option to take cash, a company has absolute dominion to determine conclusively against the world whether it will withhold distribution of profits, and if it distributes profits, whether as income or capital But it has no such dominion in regard to what it owes It must somehow discharge its debts unless it can get a release[38] It was held therefore, when a manager of a company was paid his remuneration in the shape of additional shares, that the value of the shares was taxable[39]

Bonus shares—Same company—

A company distributed its dividends in the shape of fully paid up shares in the concern, the shareholders having no option to take the profits in any other form *Held, following Commissioner of Inland Revenue* v *Blott*[40] and distinguishing *Swan Brewery* v *The King,*[41] that there was no 'income, profits or gains' to the share holders which was taxable to super tax The Court

(36) 5 A T C 525
(37) (1887) 12 A C 385
(38) 7 A T C 158 (C A)
(39) *Parker* v *Chapman* 7 A T C 158 (C A)
(40) 8 Tax Cases 101
(41) (1914) A C 231

part of the profits of the current year 1914 has been dealt with apart *from the undivided accumulations an amount sufficient in itself to have* paid a dividend on the issued ordinary shares of 25 per cent or 5s in the pound for every pound paid up and by the use of 'mere machinery" it has been converted into debenture stock not redeemable under normal circumstances for six years certain This is valid as against all the world because *Bouch v Sproule* now applies to revenue cases and because under *Blott s Case* the mere decision of the company operating through voting majorities whose private motives and interests may have been no concern of the company at all has this effect If any part of the dividends of the year can be so converted I presume all could be nor, if a six years' currency of the debenture stock is permissible do I see why six weeks should be less so How far this position is tolerable is however, a matter for the Legislature It is not material here but I think it may well be doubted whether in the long run it should be permissible for a limited liability company to create obligations for which no consideration has been given to it or to increase its paid up share capital out of its own assets without imposing on the holders of this additional share capital the usual obligations which are involved in the subscription of shares[32]

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Mr Whitmore owned the whole of the ordinary capital and he and his wife the bulk of the preference capital in Whitmores, Ltd, the rest of the shares being held by their close relatives *The company had a large accumulation of undivided profits* which it distributed partly as paid up shares in the company and partly as debentures Following *Blott's Case* the shares were not taxed but the debentures were taxed by the Revenue *Held*, following *Fisher s Case*, that the value of the debentures was not taxable[33]

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(33) *Whitmore v Commissioners Inland Revenue* 5 A T C 1

(34) 8 Tax Cases 101

(35) 10 Tax Cases 302

sell or exchange any of its assets, *held,* (1) that the net gain by realising investments at larger prices than were paid for them constituted profits chargeable with income tax, and (2) that the liability of such profit to assessment was not affected by a depreciation in the book value of other investments which the company continued to hold[45]

Per the Lord President—"The varying the investments and turning them to account are not contemplated merely as proceedings incidentally necessary for they take their place among what are the essential features of the business My view of this company is therefore that its position in the present question is entirely distinguished from that of a private individual or an ordinary trader Accordingly I think that it is wrong in its contention that increases on realisation of stocks of the company are capital sums"

Treasury Bills—Appreciation of—

The National Provident Institution bought certain Treasury Bills, of which some were held by it until maturity, others were sold in open market during their currency and the remainder were converted into War Loan *Held,* that the whole difference between the price paid for a Treasury Bill and the sum realised by the purchaser whether by holding the Bill until maturity or by selling it or converting it before maturity, represented a profit chargeable to income tax and that no part of that profit was an accretion of capital, (2) that profit so made constituted income of the year in which it is received

Per Lord Haldane— By a majority Lord Justice Warrington dissenting, the Court of Appeal held that the whole of the difference between the amount contracted for and the amount received for a bill which was sold or converted into War Loan during its currency was not necessarily taxable as a profit on a discount The difference did not necessarily represent only a profit by way of income but might in part represent an accretion to capital Such an accretion might be due to the state of the money market and the rise or fall in the value of money and the rates of interest thereon by which the price of the Treasury Bill might have been caused to rise or fall without strict correspondence with its progress towards maturity The only amount to be taxed as profit or discount in such a case was therefore the amount by which its value had increased merely by reason of its advance towards maturity The assessment was therefore ordered to be remitted for adjustment by elimination of the element of profits due to accretion of capital on this principle

My Lords on this question I am unable to agree with the view of the Court of Appeal I see no answer to the argument as stated by Lord Justice Warrington It is concise and I will adopt his words ' When a holder whether the original purchaser or not realises

(45) *Scottish Investment Trust Company v Forbes* 3 Tax Cases 231

emphasised the word 'advantage' which occurred in the Colonial Act in the *Swan Brewery Case* *Steel Bros & Coy v Secretary of State*[42] The Crown appealed to the Privy Council for leave under the prerogative powers but the Privy Council refused to give leave

A similar decision was given by the Madras High Court in *Commissioner of Income tax v Binny & Coy*[43] in which Binny & Company as shareholders in the Deccan Sugar and Abkari Company received a share of the accumulated undistributed profits of the latter concern in the shape of bonus shares

In all these cases about bonus shares and debentures, an important point to emphasize is that the recipients of the bonus shares or debentures did not *trade* in them. If they did—if for instance John Blott had been a stock jobber or Binny & Company or Steel Brothers investment or trust companies, it might have been held that the bonus shares or debentures were part of their stock in trade and therefore taxable indirectly as swelling their profits from trade even though the bonus shares had been 'capitalised' by the issuing company

Investments—Appreciation of—

It is quite a well settled principle in dealing with questions of assessment of income tax that where the owner of an ordinary investment chooses to realise it and obtains a greater price for it than he originally acquired it at the enhanced price is not profit in the sense of Schedule D of the Income tax Act of 1842 assessable to income tax But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable where what is done is not merely a realisation or change of investment but an act done in what is truly the carrying on or carrying out of a business The simplest case is that of a person or association of persons buying and selling lands or securities speculatively in order to make gain dealing in such investments as a business and thereby seeking to make profits There are many companies which in their very inception are formed for such a purpose and in these cases it is not doubtful that, where they make a gain by a realisation the gain they make is liable to be assessed for income tax

What is the line which separates the two classes of cases may be difficult to define and each case must be considered according to its facts the question to be determined being—is the sum of gain that has been made a mere enhancement of value by realising a security or is it a gain made in an operation of business in carrying out a scheme for profit making? [44]

An Investment Trust Company had powers in its Memorandum of Association to vary its investments and generally to

(42) I I T C 3?6
(43) I I T C 358 47 Mad 83?
(44) Per the Master of Rolls in the *National Provincial Bank of England* 5 Tax Cases 11

not a trade a gain or loss upon the purchase and resale of property comes within the meaning of the Income tax Acts Take even proper traders if proper traders sell their old premises and buy new ones, and sell the old premises at a higher price than they paid for them I should say it was a totally untenable proposition that anything in excess of what they had paid for the old premises is income within the meaning of the Act I do not think it is at all It is no more so in the case of a trader's income than in the case of a private individual selling his house at more than he had paid for it They were not making a trade of buying and selling debts The proposition that where anybody purchases a doubtful debt and makes more than he paid for it—one purchase he not being a trader in that kind of thing—that that is income is I think, a proposition which cannot be sustained "[47]

Property—Sale of—Receipts from—

A company formed for the purpose, *inter alia*, of acquiring and reselling mining property, first acquired and worked various properties After sometime it resold the whole to a second company receiving payment in fully paid shares of the latter company *Held*, that the difference between the purchase price and the value of the shares for which the property was exchanged was a profit assessable to income tax

The company's contention was that the case was one of substitution of one kind of capital for another and that in any case no tax should be levied until the value of the shares had been realised in money The Court held that the company was formed with the object of making profit from the sale of its property and that therefore the profits in question were liable Lord Justice Clerk stated that it was a well settled principle that where the owner of an ordinary investment realised it at an enhanced price the difference was not assessable unless the transaction amounted to carrying on a business (as in the case of a person or group of persons buying or selling lands, etc, speculatively) [48]

A company was formed with the object of acquiring estates in the Malay Peninsula and developing them by planting and cultivating rubber trees Power was taken in the Memorandum of Association to sell the property and such a sale was contemplated in the prospectus issued at the inception of the company Two estates were purchased, but the original capital being insufficient to develop them the whole of the undertaking was sold to a second company for a consideration (mainly in shares of the second company) in excess of the capital expended At the date

(47) *Assets Co v Forbes* 3 Tax Cases 542

(48) *Californian Copper Syndicate v Harris* 5 Tax Cases 159 This case was cited with approval in *Commissioners of Taxes v Melbourne Trust*, (1914) A C 1001

during currency he really receives a proportion of the total profits resulting from the fact that the bill was bought at a discount It is true that the proportion may not bear an exact relation to the period of currency but may be determined by variations in the value of money in the public credit and so forth but it seems to me that the total of the profits received by the various sellers after deducting losses if any cannot exceed the difference between the price originally paid and the sum receivable at maturity and that the considerations I have referred to merely affect the distribution of that difference between the various holders Profits made by discounting bills seem to me to rest on the same footing and conversion into War Loan also This last is simply a sale on certain terms fixed by the Government and investment of the proceeds My Lords I do not think this reasoning is really answerable

Per Lord Sumner— It is to be remembered that this is a case of a company which carries on a business and employs its funds for and in that business The case stated finds no fact to distinguish these transactions from any other business use of money It is not the case as to which I say nothing of a private person who not in the course of any business at all realises an investment and comes well out of it Similarly, I see no warrant for trying to discriminate between the capital used in *the transaction and the income obtained from its use* The *Statute* says nothing about it To discount a Bill even a Treasury Bill you must have money or money s worth but whether an accountant would say that it came out of or should be debited to capital or income makes no difference to the fact of discounting The excess of what is got back to morrow over what is put in to day is profit and it is but rarely that even an economist can tell us what is appreciation of capital and what is not [46]

Realising assets—

The assessee company, which was formed of solvent contributories of a Bank acquired from the liquidators the outstanding assets of the Bank, including sums expected to be recovered from estates of contributories paying therefor a sum sufficient to enable the liquidators to discharge the liabilities of the Bank From time to time the company sold portions of these assets at prices exceeding the values at which they were estimated in the books of the liquidators *Held,* that the case as stated did not contain materials for a decision whether profits liable to assessment to income tax had been made But the judgment set out general principles

Per Lord Young— Now what about recoveries from debtors The company took them over I should say that I have *really* no doubt that any person or any company making a trade of purchasing and selling investments will be liable to income tax upon any profit which is made by that trade It is quite an intelligible business

But it is another proposition altogether that where there i

(46) *The National Provident Institution* v *Brown* and *Ogston* v *The Provident Mutual Life Assurance Association* 8 Tax Cases 57

no doubt come into consideration A landowner in England may establish a game farm on part of his estate, and make profits thereby which would be liable to income tax, and he may also sell parts of his estate for building purposes, but his trade as a game farmer does not bring his sales as a landowner within the Income tax Acts, and I see no difference in this respect between his position and that of the company Again, a landowner may lay out part of his estate with roads and sewers, and sell it in lots for building but he does this as owner, not as a land speculator Land owning is not a trade '[50]

The assessee company was incorporated in 1904 with the primary object of acquiring, managing and developing with a view to ultimate sale, certain lands in British Columbia which were held in trust for various persons who were interested therein either as owners, joint owners or as trustees Subject to an extraordinary resolution, the company had power to deal in other lands, but it had not at any time exercised that power The share capital of the company was fixed at a nominal amount, solely to facilitate division among the beneficiaries, and was not determined by reference to the value of the lands acquired All the ordinary shares had been allotted in consideration of the conveyance of the lands to the company, and these shares had been continuously held by the original allottees, or their representatives Working capital had been provided by the issue to ordinary shareholders of preference shares for cash In 1908 the company created and allotted to persons other than the ordinary shareholders deferred shares in return for services which enhanced the value of the lands *Held,* that the surplus arising from the sale by the company of portions of the lands was not the profits of a trade or business, and, that the function of the company was merely to realise the capital value of the respective interests in the land under the trust

Per Rowlatt, J—' In this case the question is whether the company which was formed for what I may call family reasons is liable for income tax on what it makes by selling the lands Now the question is whether the company has really only realised some property held as capital by those who became its shareholders namely, the people entitled under the trust or who started or founded the trust or whether it has got to the point of embarking in a trade or business of which these receipts are the resulting profits Now the company proceeded in a very enterprising way undoubtedly It cleaned the land and formed roads It sold parts of it and kept some of the money and put it back into the land and so on, and it gave a share in its capital to certain people who were instrumental in bringing a railway there Undoubtedly it has done very well Under these circumstances the Attorney General and the Revenue contend that it has gone beyond the stage of

(50) *Stevens v Hudson Bay Coy Ltd*, 5 Tax Cases 424

of the sale a considerable acreage had been planted, but no rubber had yet been produced or sold *Held*, that the profit on the sale was not a profit assessable to income tax, but was an appreciation of capital

Per Lord Salvesen —The only difficulty arises from the decision in the *Californian Copper Syndicate*[48a] That facts in that case were not unlike those which occur here but the grounds of the decision appear to me not to be applicable Lord Trayner said (in that case) — I am satisfied the appellant company was formed in order to acquire certain mineral fields or workings—not to work the same themselves for the benefit of the company but solely with the view and purpose of reselling the same at a profit [49]

The Hudson Bay Company established by Charter were the owners of large territories in Rupert's Land, North America In 1869 they surrendered to the Crown their territory and rights of government in exchange, *inter alia*, for a money payment and for a right to claim, within fifty years, a twentieth share in certain lands in the territory as from time to time the lands were settled The lands granted to the company in pursuance of this agreement were sold by the company from time to time, and the proceeds applied partly in payment of dividends and partly in reduction of capital *Held*, that the proceeds of the sales of the lands so granted were not profits or gains derived by the company from carrying on a trade of dealing in land, and were not assessable to income tax

Per the Master of Rolls — The real question is whether this money can be regarded as profits or gains derived by the company from carrying on a trade or business In my opinion it cannot The company are doing no more than an ordinary landowner does who is minded to sell from time to time as purchasers offer portions suitable for building of an estate which has devolved upon him from his ancestors I am unable to attach any weight to the circumstance that large sales are made every year This is not a case where land is from time to time purchased with a view to resale the company are only getting rid by sale as fast as they reasonably can of land which they acquired as part of a consideration for the surrender of their Charter '

Per Farwell L J — It is clear that a man who sells his land or pictures or jewels is not chargeable with income tax on the purchase money or on the difference between the amount that he gave and the amount that he received for them But if instead of dealing with his property as owner he embarks on a trade in which he uses that property for the purposes of his trade then he becomes liable to pay not on the excess of sale prices over purchase prices but on the annual profits or gains arising from such trade in ascertaining which those prices will

(48 a) 5 Tax Cases 159 This case was cited with approval in *Commissioners of Taxes v Melbourne Trust* (1914) A C 1001

(49) *Tebrau (Johore) Rubber Syndicate Limited (in Liquidation) v Farmer* 5 Tax Cases 658

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Per Rowlatt J— In this case the question is whether the company which was formed for what I may call family reasons is liable for income tax on what it makes by selling the lands Now the question is whether the company has really only realised some property held as capital by those who became its shareholders namely the people entitled under the trust or who started or founded the trust or whether it has got to the point of embarking in a trade or business of which these receipts are the resulting profits No the company proceeded in a very enterprising way undoubtedly It cleaned the land and formed roads It sold parts of it and kept some of the money and put it back into the land and so on and it gave a share in its capital to certain people who were instrumental in bringing a railway there Undoubtedly it has done very well Under these circumstances the Attorney General and the Revenue contend that it has gone beyond the stage of

(50) *Stevens v Hudson Bay Coy Ltd* 5 Tax Cases 424

merely realising the property and has embarked upon a business in land which it has not in the real sense bought but in land which came to it The Commissioners have held that it is not so and I am not prepared to differ from the Commissioners I very much doubt whether it is not a question of fact and only appealable in the sense of the question whether there is any evidence of it or not It is a case which is not very far from the line but I think it is on the right side of the line If this had been an individual he need not have had a company He might have done all these things and if he had been a prudent or a public spirited man he would have done all these things If a landowner finding his property appreciating in value sells part of it and uses part of his money still further to develop the remaining parts and so on he is not carrying on trade or business, he is only properly developing and realising his land [1]

The assessee company was incorporated with the primary object of acquiring, developing and turning to account certain concessions in German South West Africa which included, (i) mineral rights, (ii) railway rights, and (iii) the right to the freehold of some 3,000,000 acres of land to be selected by the company The company had power under the concession to transfer any or all of its rights to other persons or companies, and in particular had the right to turn the land granted to it to any account it might think most beneficial for its interests, though it was understood between the company and the German Government that the colonisation of the country should be encouraged by the sale of land to settlers From time to time throughout the life of the company sales of land were made to settlers and considerable tracts were also sold to other companies The proceeds of the land sales were always carried to capital account, but the profits made on the sale of shares received from one of the companies in consideration of land transferred to it was distributed by way of dividend Apart from the acquisition of the original concession, the company never purchased for itself any land or land rights *Held,* that the profits derived by the company from sales of land were not of a capital nature and should be taken into account in computing for income tax purposes the profits arising from the trade, adventure, or concern in the nature of trade exercised by the company

' The question that we have to determine is whether the moneys derived from these sales of land fall into income or are to be treated as capital of the company The conclusion that I come to on reading the documents presented to us is this—that there is no definite segregation of the moneys received from the sales of land for the purpose of capital . In the *Hudson's Bay Coy* v *Stevens* what . .

(1) *C H Rand* v *The Alberni Land Coy, Ltd,* 7 Tax Cases 629 30

. . is decided by the Court is this, that inasmuch as the Commissioners found the facts and had drawn the inference negativing the fact that the company were carrying on a trade in buying and selling land, therefore they were not liable to income tax for such profits or gains by the sale of land, they are not derived by trading or carrying on business but by the sale of an old possession "[2]

In 1870 the State of Alabama raised a loan for the purpose of constructing a railway In 1876 the State defaulted and transferred to certain trustees for the benefit of bond-holders certain lands The trustees were to sell the property, pay 10 per cent of the proceeds to the State till the State had received all interests paid by it on the bonds before the default, and to distribute the balance amongst the bond holders

At the end of 10 years all bonds not presented or surrendered were to be barred from the benefits of the trust and to carry no claims against the State A Company was formed with the object of putting into a marketable form the interests of the bond holders who had surrendered the bonds The capital of the Company was 10,000 Preferred A Shares of £10 each, to be subscribed at par, and 26,000 Deferred B Shares of £1 each to be issued fully paid, 2 B Shares being given as bonus on each A share subscribed for The bond holders were given the first option of subscribing for the Preferred Shares and they were also given the choice of surrendering to the Company their interest in exchange for non-interest bearing Instalment Certificates equal to the amount of the bond *plus* accrued interest thereon *plus* 3-B Shares for each bond

Of the original issued capital 56 per cent belonged to bond holders and 44 per cent to others After paying off the State, 70 per cent of the net proceeds from the sale of lands was applied in paying off the instalment certificates and 30 per cent in paying dividends on A Shares and redeeming them at par By 1886 the State had been fully paid off The interests of all bond holders except those who had not surrendered the bonds within the 10 years' limit had also been acquired by the Company. Also an American Company had been formed to hold the trust lands in place of the trustees whose term had expired and the whole of the shares in this American Company had been allotted to the assessee Company The assessee Company purchased certain other lands to develop the trust property In 1904 all the Preferred Shares had been paid off and by 1912 two-thirds of all the Instalment Certificates had been repaid In that year, however, further Deferred Shares were issued and the capital thus

(2) Per Pollock, M R—*Thew v South West Africa Company, Ltd.* 9 Tax Cases 141

raised was used in paying off the bulk of the remaining Instalment Certificates

Held, that the Company was carrying on a trade

The Hudson Bay Co, Ltd v *Stevens*,[3] and *Rand* v *The Alberni Land Company, Ltd*,[4] distinguished

Per Rowlatt, J—' There were these lands in the hands of the bond holders it is not as if a band of speculators outside the bond holders had come and bought these lands the bond holders themselves as individuals said let us take these lands from the body which we are and we can get some other people to come in with us we ourselves can put up some more money and we will take these lands and give for them certain preferential rights We will not launch out widely but we will launch out We will embed the realization of these lands in an undertaking which must be wider than the bare realization with the minimum of nursing and the minimum of necessary expenditure which a landowner himself might be inclined to indulge in '[5]

In a case in which all that appeared in the books of a money lender were entries to the effect that he had purchased a property in 1919 and again another in 1924 and that they were both sold in 1926 27 and there was nothing in the accounts or other documents to show that the income derived from these properties and the expenses incurred on them were included in and made part of the accounts of the money lending business, the Income tax Officer treated the difference between the cost and sale prices as a business profit acting on the general presumption that money lenders of the particular class generally buy and sell such properties in the course of their business The Madras High Court held that there was no evidence to justify the findings of the Income tax Officer[6]

On the other hand profits arising from the sale of land taken over in satisfaction of debts are profits from business if the creditor's business is that of lending money on the mortgage of land The business is analogous to that of pawn broking[7]

The assessee, a money lender, received in settlement of an account the right to certain simple debts, to certain mortgage debts and a rubber plantation The plantation was subsequently sold at a profit, and the question arose whether the profit was or

(3) 5 Tax Cases 424

(4) 7 Tax Cases 629

(5) *The Alabama Coal Iron Land and Colonization Co Ltd* v *Mylam* 11 Tax Cases 232

(6) *R M V R M Virappa Chettiar* v *Commissioner of Income tax, Madras*, A I R 1930 Mad. 1?3

(7) *S L S Chettiappa Chettiar and S L Rm Ramasami Chettiar* v *Commissioner of Income tax Madras* A I R 1930 Mad 49

12 Tax Cases 303

was not casual Having regard to the facts of the case, *viz* all the accounts being kept together, the loss under the simple and *mortgage debts being claimed* as a business loss the debit of the maintenance expenses of the plantation to the business account and the credit of income from the plantation to the business account, it was held that there was evidence to justify the finding of the Department that the income arose from business, and that the profit was not a capital appreciation[8]

Whether you are trading or realising a capital accretion is a question of fact Even though a company may under its articles of association be empowered *inter alia* to trade in a particular manner, there is no natural presumption that it is doing so and every transaction must be examined on its merits with a view to deciding whether it is trade or only the realisation of capital[9]

Securities—Sale of—Surplus—When taxable—

Per Lord Dunedin in *Commissioner of Taxes* v *Melbourne Trust*[10]

In the present case the whole object of the company was to hold and nurse the securities t held and to sell them at a profit when convenient occasion presented itself

Their Lordships therefore come to the conclusion that there is ample evidence here that the company is a trading company and that the surplus realized by it by selling the assets at enhanced prices is a surplus which is taxable as profit

Coal bings—Sale of—Receipts from—

Certain bings of colliery dross which had been lying on an estate for many years were disposed of by the land owner to various parties who contracted to remove the whole of the dross within a limited period (3½ months)

Held that the payments were capital receipts and not profits

Per Lord Cullen.— It is not suggested that Lord Belhaven traded in bings the transaction was a contract of sale of the contents of a capital asset consisting of the bing and the price received represented merely a change in the form of capital[11]

Land—Sale of—Unpaid purchase money—Interest on—

The Hudson Bay Company owned large tracts of land in Canada and from time to time sold plots or blocks of land to purchasers desiring to take up and occupy land for settlement in that country The company entered into agreements with pur

(8) *O R M O M Sp Lakshmanan Chetty* v *Commissioner of Income tax Madras* A I R 1930 Mad 1?1

(9) *C I F* v *Hyndland Investment Co* 8 A T C 3 8

(10) (1914) A C 1001

(11) *Roberts* v *Lord Belhaven s Executors* 9 Tax Cases 501

chasers unable to provide the whole purchase money in one sum, under which the purchaser paid a certain sum down when the contract was signed and the balance by equal annual instalments, each with interest calculated on the balance of the purchase money remaining unpaid The company agreed on completion of payment of the purchase money and interest to convey the land to the purchaser, and meanwhile permitted the purchaser to occupy the land until default be made in payment of the sums of money agreed upon, in which case it reserved the right to cancel and determine the agreement and to re enter upon or to resell the lands, all payments theretofore made on account being forfeited to the company *Held*, that the interest on unpaid purchase money was income and not capital [12]

Premium—Mining Lease—Rent—Royalty—

'Salami' or premium paid at the beginning of a mining lease for a long period represents the purchase price of an out and out sale of the property and the sum received is 'capital' and not 'income' But 'rent' or 'royalty' paid periodically is income [13]

See also dicta in In re *Goopta Estates, Ltd (Calcutta)* [13 a] If the letting out of property upon lease for premium and for rent is the business of an assessee, then the premium will be assessable as income either under section 10 or under section 12 But when a premium is received merely as an incident in the possession of property (even if leasehold) and there is no finding that letting out property is the business of the assessee, the premium received is capital

Business closing down—Sale of stock—

Whether the realisation of the value of stock of a business which is closed down is a capital receipt or a profit depends on the answer to the question—when does a business which is being closed down cease to be a business which is being carried on? That is, it is a question of fact

Per Lord Atkinson—"A trader who wishes to retire from business may wind up his business in several ways, he may sell his concern as a going concern, or he may auction off his stock But there is another way quite as effectual and that is by continuing to carry on his business in the ordinary way but not replenishing his stock which he has accumulated as it is sold Then he will leave himself with no stock, and, therefore he can retire from business But the fact that he realises stock in the process of carrying on the trade as he has hitherto done will effectuate both purposes"[14]

(12) *Hudson Bay Co* v *Thew* 7 Tax Cases 206

(13) *Raja Shiva Prasad Singh* v *Rex*, 1 I T C 384

(13 a) A I.R. 1930 Cal 1

(14) See *J and R O'Kane and Company* v *Commissioners Inland Revenue*, 12 Tax Cases 303

See also per *Lord Phillimore* in *Doughty* v *Commissioners of Taxes* (a Privy Council case) [15]

'Income tax being a tax upon income it is well established that the sale of a whole concern which can be shown to be a sale at a profit as compared with the price given for the business or at which it stands on the books does not give rise to a profit taxable to income tax It is easy enough to follow out this doctrine where the business is one wholly or largely of production Where however a business consists entirely in buying and selling it is more difficult to distinguish between an ordinary and a realisation sale the object of either case being to dispose of goods at a higher price than given for them The fact that large blocks of stock are sold does not render the profit obtained anything different in kind from the profit obtained by a series of gradual and smaller sales This might even be the case if the whole stock was sold out in one sale Even in the case of a realisation sale if there were an item which could be traced as representing the stock sold the profit obtained by that sale though made in conjunction with a sale of the whole concern might conceivably be treated as taxable income "

See also *Martin* v *Lowry* set out under sections 2 (4) and 4 (3) (vii)

Mineral lease—Foreclosure of—Compensation paid—

The compensation paid to a lessee of mineral rights for compelling him to foreclose his lease is a capital receipt The fact that compensation is based on the value of the minerals left unworked does not make the payment one of an accumulated loss of profits

Per Lord Buckmaster—' There is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test I am unable to regard this sum of money as anything but capital "

Per Lord Wrenbury—"Is a sum profit which is paid to an owner of property on the terms that he shall not use his property so as to make a profit? The answer must be in the negative The whole point is that *he is not to make a profit and is paid for abstaining from seeking to make a profit* The matter may be regarded from another point of view—the right to work the area in which the working was to be abandoned was part of the capital asset consisting of the right to the whole area demised Had the abandonment extended to the whole area it would be impossible to contend that the compensation would be other than capital It was the price paid for sterilising the assets from which otherwise profit might have been obtained What is true of the whole must be equally true of part "[16]

This principle was also followed in *Guinness Son & Coy* v *Commissioner of Inland Revenue*[17] in which the firm

(15) (1927) A C 327 43 T.L R 207
(16) *Glenboig Union Fireclay Company* v *Commissioners of Inland Revenue*
(17) 3 A T C. 686
12 Tax Cases 427

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(15) (19?7) A C 3?7 43 T.L R ?07
(16) *Glenboig Union Fireclay Company* v *Commissioners of Inland Revenue*
(17) 3 A T C. 686
1? Tax Cases 4?7

who were brewers and whose stock of barley was commandeered by the Crown during the War claimed that the profits made on the compulsory sale to Government were not assessable to tax on the ground that they were not income but capital receipts The Irish Court of Appeal upheld the contention (Pim, J dissenting) Pim, J 's point was that the barley was part of the circulating capital of the company, not its fixed capital and that, therefore, the case was more like that of *Beynon v Ogg*[18] than like the *Glenboig* case

In *Commissioners of Inland Revenue v Newcastle Breweries*[19] however, in which the greater part of the rum imported by the firm for blending purposes had been similarly commandeered by the Admiralty it was held by Rowlatt, J that the compensation paid was a profit arising from the firm's trade The decision of the Irish Court in the *Guinness* case was deliberately departed from The reasoning of Rowlatt, J was that in a case like the *Glenboig* case what was done was to stop the trade and pay compensation whereas in the *Sutherland*[20] case and the present one all that happened was a compulsory sale of a portion of the goods and that the fact that the sale was compulsory could not make any difference The Court of Appeal confirmed Rowlatt, J 's *judgment The House of Lords confirmed the judgment of* the Court of Appeal but considered the *Guinness* case distinguishable

Forests—Felling timber—Receipts from—

It was stated by the Allahabad High Court in the *Tehri*[20 a] case that it was a question of fact whether receipts from timber sold in forests constituted capital or income

Annuities—Repayment of debt—

The Secretary of State for India exercised the option of purchasing the undertaking of a Railway Company by payment of an annuity for a term of years instead of a lump sum *Held,* by the House of Lords, that income tax could not be charged on the annuity

Per Vaughan Williams, L J—"It is not denied, but that the Income tax Acts would apply and income tax be payable in respect of so much of the annual payment as was not a repayment of an instalment of the antecedent debt it was not denied—and is not denied in the present case—that income tax is payable upon so much *of this annual sum,* the annual instalment of purchase money payable by the Indian Government, as consists of interest The whole question in this case is Is income tax

(18) 7 Tax Cases 125
(19) 12 Tax Cases 927
(20) 12 Tax Cases 63
(20 a) 1930 A.L.J 579

payable upon that portion of the annual payment which you can discover from the very terms of the contract is a mere payment of an instalment necessary to complete the payment of an existing debt? In my judgment no income tax is payable in such a case

Per Stirling L J— We have express authority in the case of the *Nizam s Guaranteed State Railway Company v Wyatt* [1] of the Divisional Court for saying that the mere fact that a sum is designated as an annuity is not conclusive but that the real nature of the transaction must be looked at Now if we look at the real nature of the transaction here these so called annuities are simply annual payments of equal amount being instalments of a debt and are made up partly of principal partly of *interest calculated at a particular rate* *On the face of the contract* therefore it appears that each annual instalment contains principal money and a portion of interest which can be readily ascertained by a competent actuary It seems to me therefore that in that state of things we are right in following the principle which I take to be laid down in *Foley v Fletcher*[2] that the word annuity under those circumstances is not to be read in such a way as to make capital taxable Now the difficulty which I certainly felt in the case arises from this that it is said (and forcibly said) by the Attorney General If that be so then *in the case of every terminable annuity* which has been *purchased for* value the same thing occurs and you ought if you logically follow out the principle to say that each annual payment of that annuity ought to be split up between capital and interest and the only portion which represents interest ought to be taxed I feel the full force of that re mark but it seems to me that the cases are not the same Those are cases of purchase of annuities where investment has been made in that form of property and the legislature in so many words has said that that is to be taxed and it is recognised in this very case throughout that *an annuity of that kind* is taxable And I in no way depart from that. The case to which I have referred seems to me to show that it is a differ ent matter where it appears on the face of the transaction that the so called annuity is not a thing of that kind but simply represents instalments of an existing debt

Per Mathew L J— *Annuity in the ordinary sense of the ex* pression means the purchase of an income It generally involves the conversion of capital into income and reasonably enough where the buyer places himself in that position the Act of Parliament taxes him he is taken at his word he has got *an income* secured in the way I have mentioned Now has such a case any analogy whatever to the present? It appears to me none Here was a sum of money a lump sum stipulated for in the first instance which was to represent the capital outlay If that money had been handed over to those who were entitled to it it might have been invested ought to have been invested and probably would have been invested and if invested the income of it would be taxable and not the principal sum Now that sum representing the

(1) 4 Tax Cases [illegible]
(2) 3 H & N 69

capital outlay is by the terms of the contract a sum that may be paid off by what is called (unfortunately) in the contract an annuity It really meant by annual instalments'

Per the Lord Chancellor— Still, looking at the whole nature and substance of the transaction I cannot doubt, I say, that what is called an annuity in the contract between the parties and in the Statute was a mode of making the payment for that which by the hypothesis on which I am speaking had become a debt to be paid by the Government If it was to be a debt paid by the Government it introduces this consideration was it the intention of the Income tax Act ever to tax capital as if it was income? I think it cannot be doubted, both upon the language of the Act itself and the whole purport and meaning of the Income tax Acts that it never was intended to tax capital as income at all events

Under the circumstances I think I am at liberty so far to analyse the nature of the transaction as to see whether this annual sum which is being paid is partly capital or is to be treated simply as income, and I cannot disagree with what all the three learned Judges of the Court of Appeal pointed out that you start upon the inquiry into this matter with the fact of an antecedent debt which has got to be paid, and if these sums which it cannot be denied are partly in liquidation of that debt which is due are to be taxed as if it was income in each year in which it is being exacted the result is that you are taxing part of the capital As I have said I do not think it was the intention of the Legislature to tax capital and therefore, the claim as against those sums fails

My Lords as I have already said I do not think it is a matter on which one can dogmatize very clearly There is no doubt that what has been pointed out is true that in one sense the Legislature has in the sense in which I have used the words myself taxed capital Where you are dealing with income tax upon a rent derived from coal you are in truth taxing that which is capital in this sense, that it is a purchase of the coal and not a mere rent All I have to say upon that and other illustrations of the same character is this, that the income tax is not and cannot be I suppose from the nature of things cast upon absolutely logical lines and that which justifies the exaction of the tax under these circumstances is that the things taxed have either been or have been by construction by Courts held to be what has been specifically made the subject of taxation, and my answer to an argument derived from those circumstances here is that looking at the words here used and the word 'annuity' used in the Act I do not think that this comes within the meaning which (using the Income tax Acts themselves as the expositors of the meaning of the word) is intended to hit at by the word 'annuity' which is the only word that can be relied upon here as justifying what would otherwise be to my mind a taxation of capital '[23]

Annuities under education and endowment assurances in which the policy holder receives back annuities for a given number of years depending on the survival of the nominee (usually a child) are not taxable in so far as the

(23) *Secretary of State for India v Scoble and others* 4 Tax Cases 618

annuities represent repayment of premia paid but only on the interest *on such premia* In every case the taxability of an annuity depends on its nature. There is no simple touch stone to be applied, such as that there was or was not a pre-existing debt. It is immaterial whether the consideration is money paid or property assigned. An important test is whether you are parting with a capital sum or not. In this case the capital sum was returnable whereas when you purchase an annuity outright *you practically sell a capital asset just as you would sell a patent* or copyright in return for an annual royalty [24]

Royalty—Coal—

Per Mukerjee, J—(After referring to *Foley* v *Fletcher*[24-a] and *Secretary of State for India* v *Scoble*[25]) the term "income" is not defined in the Act The word "income" however is, to use the language of Sir George Jessel in *In re Huggins*,[26] as large a word as can be used to denote a person's receipts and it seems to me that it is wide enough to include a royalty received from a mine The nature of a royalty was examined at some length by Lord Denman, C J in *Reg* v *Westbrook* and *Reg* v *Everist*[27], it appears to have been contended in that case that it is altogether wrong in principle to consider the royalty as rent, because it is a sum paid not for the renewing produce of the land, but for severed portions of the land itself The learned Chief Justice answered this argument by observing that the occupation of a mine is only valuable by removal of portions of the soil, and whether the occupation is paid for in money or in kind, is fixed beforehand by contract or measured afterwards by the actual produce, it is equally in substance a rent, inasmuch as it is the compensation, which the occupier pays the landlord for that species of occupation, which the contract between them allows As pointed out by Lord Denman, this would not admit of an argument in an agricultural lease, where a tenant was to pay a certain portion of the produce, which would be admitted to be in all respects a rent service with every incident to such a rent The same view was adopted in substance by Sir Charles Abbott, C J in *King* v *Altwood*[28] and by Lord Blackburn in *Coltness Iron Company* v *Black* [29] *Lord Blackburn referred to the observations of* Lord Cairns in *Gowan* v *Christie*[30] that a mineral lease when properly considered, is in reality a sale out and out of a portion of the land, but remarked that this did not justify the inference, that no income tax should be imposed on the rent reserved on a mineral lease The distinction between a price paid down in one sum for the out and out purchase of the minerals forming part of the land and the rent and royalty which con

(24) *The Right Rev W W Perrin* v *Dickson* 8 T C 153 and 372, 45 T L R 621
(24 *a*) 3 H & N 769
(25) (1903) A C 209, 4 Tax Cases 618
(26) (1882) 51 L J 935 938
(27) (1847) 10 Q B 178 74 R R 248
(28) (1827) 6 B & C 277
(29) (1881) 6 App Cas 315, 335
(30) (1873) L R 2 H L (Sc) 273

stitute, in reality, a payment by instalments of the price of those minerals, is intelligible, though it may not be quite logical, thus affording an illustration of Lord Halsbury's observation in *Quinn* v *Leathem*[31] that law is not necessarily a logical Code and is not always logical at all The view I take receives some support from the definition of the word "income' as given in the Oxford Dictionary, Vol V, page 162 The same view of the matter appears to have been adopted in the American Courts in which it has been held that the term "income" includes a sum accruing as royalty under an oil lease of land granted in consideration of a royalty of part of the oil see *In re Woodburn's Estate*[32] In the case of a mine, the rent may be (*a*) a fixed sum, (*b*) a certain annual sum, (*c*) a royalty on the amount of minerals extracted payable at fixed intervals or times, (*d*) such a royalty, but not less in the aggregate than a fixed amount each year (as in the lease produced in the present case), and (*e*) such royalty and a covenant to mine a certain minimum amount or pay royalty thereon But whatever form the consideration for the lease may assume, the money or thing which is paid for the occupation of the mine though it is in one sense a preferred debt is in its essence rent and has all the qualities there of see *Raynolds* v *Harna*,[33] where it was held that money received as royalty from a mine was income" and distributable as such and not as a part of the corpus of the estate, because royalty is the most appropriate word to apply to rental based on the quantity of coal or other mineral that is or may be taken from a mine (see also a number of similar cases collected in Barringer and Adams on Mines, pp 9 15) I must hold consequently that the royalty received by the plaintiff is ' income" within the meaning of Act II of 1886[34]

Annuity—Payment for goodwill, etc —

The assessee was a residuary legatee of her husband who was a senior partner in a firm the articles of partnership in which were "In the event of the death of one or both of the senior partners, the remaining partners or partner may continue the use of the firm's name and established trade 'marks' and good will paying quarterly to the Trustees of the deceased senior partner or partners the sum of £500 each for a period of five years for the privilege, after which it may be enjoyed without further payment and in the event of the death of one or both of the senior partners and after 31st August, 1921, in the event of the death of a specified junior partner the surviving partner or partners shall proceed to liquidate all business open at the time of the partner's death, a period of six months being allowed for this purpose, and shall then pay over to the executors the deceased partner's ascertainable share of capital, etc " The question arose whether the quarterly payments of £500 were income or instalment payments of capital Rowlatt, J held that

(31) (1901) A C 495, 506
(32) (1891) 21 Am. St Rep 932
(33) (1893) 55 Fed Rep 783, 800
(34) *Manindra Chandra Nandi* v *Secretary of State*, (1907) 34 C 257

the payments were income paid for the use of the firm's name, goodwill, etc, a payment concurrent with the enjoyment of the thing for which the payment is made, though the payment is only for five years [35]

Annuity—Patent—Sale of—Receipt from—

A, a non resident alien, gave to B, an English Company, the right to sell and manufacture certain articles by a secret process in return for a payment of a percentage on the gross receipts from sales Before paying the amount to A, B deducted the income tax due thereon *Held* that B was entitled to do so

Per Phillimore, J—This case is not like *Scoble s case*[36] or the case of *Foley v Fletcher*,[37] because there is no first ascertaining of a lump sum and it is an arrangement under which no lump sum is apportioned to the annual payment and I cannot help noticing—whether the argument carries force with me or not it certainly did seem to carry force with the House of Lords—that the process by which the annuity was ascertained in that case was a process which involved in the first instance the finding of a lump sum To my mind it can make no difference but it obviously made a difference with the House of Lords in the case of *Scoble v Secretary of State for India* and if it does make a difference in the opinion of the highest tribunal I must pay attention to it I find here there is no such fact Therefore upon the whole I think this is an annuity [38]

In India B could not deduct the tax, but the income in question would be taxable

Patents—Sale of—Consideration for—Payments in instalments—

The British Dye Stuffs Corporation gave an American Company the right to exploit its patents and secret processes in certain territories In return the Corporation received £25,000 a year for 10 years *Held*, that the annual payments were income and not the repayment in instalments of the purchase price of a capital asset

Per Rowlatt, J— It is one of those cases that just depends really on how you look at it It is really using this property if you like and taking an annual return for it roughly corresponds probably to its average life and not a sale once and for all of a capital asset

Per Bankes, L J—In the Court of Appeal I do not myself think that the method of payment adopted in carrying through a transaction is very much a guide of the true nature of the transaction I read this agreement taking it as a whole as a trading convention The amount which is payable by the one company to the other is not in truth and in fact the purchase price of part of the property

(35) *Mrs Mackintosh v C I T* 14 Tax Cases 15 7 I T C 2l.
(36) (1903) 1 K B 494 4 Tax Cases 618
(37) (1858) 3 L J Ex 100 3 H & N 69
(38) *Delage v Nugget Polish Co* (1905) 92 L T 682

of the English Company, but it is only a method of arriving at the value of the processes and patents . ."[39]

Patents—Sale of—Consideration for—Shares in another company—Lump sum paid—

A company sold the patent rights it had to two Companies in Japan and America respectively in consideration of a lump sum payable by 10 equal instalments plus a royalty in the former case and in consideration of a certain share in the American Company in the latter case *Held*, by the Court of Appeal (reversing the decision of Rowlatt, J) that it was a question of fact—to be decided by the Commissioners—whether the company was trading in patents or merely realised their capital rights in their patents and that even on merits the findings of the Commissioners were right, *viz*, that the money received in addition to the royalty was capital [40]

Patents—Sale of—Royalty—Dependent on profits—

The assessee was joint inventor and jointly entitled to letters patent in respect of certain appliances which were manufactured and sold, under a license from the assessee and his co inventor, by a company of which they were the sole directors and shareholders In conjunction with the company they agreed to sell to another company, *inter alia*, (*a*) the said inventions, letters patent and all rights appertaining thereto, and (*b*) the goodwill of the company, in consideration of a sum of £750 payable as to £300 by three instalments of £100 each and as to the balance of £450 by a "royalty" There was no liability to super tax in respect of this payment of £750, which was a capital receipt The purchasers also agreed to pay by way of additional consideration a "further royalty" of 10 per cent upon the invoice price of all machines constructed under the said inventions and sold during a period of ten years *Held*, that the "further royalty" did not constitute part of a capital sum but represented a share of the profits of the purchasing company and formed part of the income of the assessee and that, as such, it had been correctly included in the assessment to super tax made upon him.

Per Rowlatt, J—I do not think there is any law of nature, or any invariable principle that because you can say a certain payment is considered for the transfer of property, therefore it must be looked upon as the price in the character of principal It seems to me that you must look at every case, and see what the sum is A man may sell his property for a sum which is to be paid in instalments, and when you see that that is the case that is not income or any part of it—that was the case of

(39) *British Dye Stuffs Corporation* v *Commissioners of Inland Revenue*, 3 A T C 532

(40) *Firth Brearley Stainless Syndicate* v *Collins*, 9 Tax Cases 520

Foley v Fletcher[41] A man may sell his property for what is an annuity, that is to say, he causes the principal to disappear and an annuity to take its place If you can see that that is what it is, then the Income tax Act taxes it Or a man may sell his property for what looks like an annuity, but you can see quite well from the transaction that it is not really a transmutation of a principal sum into an annuity, but that it is really a principal sum the payment of which is being spread over a time, and is being paid with interest, and it is all being calculated in a way familiar to accountants and actuaries, although taking the form only of an annuity That was *Scoble's case*[42] when you break up the sum and decide what it really was On the other hand, a man may sell his property nakedly for a share of the profits of a business, and if he does that, I think the share of the profits of the business would be undoubtedly the price paid for his property, but still that would be the share of the profits of the business and would bear the character of income in his hands, because that is the nature of it It was a case like that which came before Mr Justice Walton in *Chadwick v Pearl Life Insurance Company*[43] It was not the profits of a business, but a man was clearly bargaining to have an income secured to him, and not a capital sum at all, namely the income which corresponded with the rent which he had before

I therefore think that what one has to do is to look and see what the sum payable really is The ascertaining of an antecedent debt is not the only thing that governs it It does not govern it by magic, but it is a very valuable guide in a great many cases, undoubtedly Here, the property was sold for a certain sum and in addition the vendor took an annual sum which was dependent in effect, on the volume of business done, that is to say, he took something which rose or fell with the chances of the business I think, when a man does that, he does take an income[44]

Patents—Guaranteed Royalty—

By an agreement between an inventor and a company formed to develop his patents the inventor was guaranteed a minimum royalty for a specified period

Held, that the guaranteed payments were not capital receipts but income to the inventor

Per Rowlatt, J—"It is not the case of paying a purchase price by instalments "[45]

Patent—Consideration for—

The assessee and another were joint inventors of synchronising gears which were patented both in the United Kingdom and in the U S A The inventions were used by the Governments of both countries during the war, and ultimately the inventors

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(41) 7 W R 141, 3 H & N 769
(42) 4 Tax Cases 618
(43) (1905) 2 K B 507
(44) *William John Jones v Commissioners of Inland Revenue*, 7 Tax Cases 310.
(45) *Wall v Ionides*, 9 Tax Cases 392

were given £70,000 by the British Government and £15,000 by the United States Government for the use of the patent. The assessee claimed that the payments were capital and not liable to tax. *Held*, by the House of Lords that, in view of the fact that the corpus of the patent had not been given up by the inventor and that the Royal Commission for Awards had fixed the compensation at the probable reasonable royalty for four years, the payments represented royalties for four years and were therefore *taxable as income.*[46]

Patents—Sales of—

In *Ducker* v. *Rees Roturbo Development Syndicate*,[47] the House of Lords followed the *California Copper Syndicate* and *Melbourne Trust cases* and reaffirmed the principle that "a gain made in an operation of business in carrying out a scheme of profit making" was taxable. The point in issue was whether in this particular case there was a solitary or accidental disposal of a capital asset or whether the company sold its patents as a *regular and systematic business*. The *question was one of fact* and there was no misdirection on the part of the Commissioners. Though the line in dispute was one which the company did not intend to develop extensively there was evidence to show that it intended to sell and make profits on them. The House of Lords therefore declined to interfere.

The assessee possessed patents for certain machines and processes. In selling these machines he sold to the purchasers also the right to use the processes within the buyer's mills only, but if necessary beyond the use involved in the sale of the articles. He also agreed not to instal his machines—with one exception—in the neighbourhood of his purchaser's mills. He claimed that his receipts were the sale-proceeds of selling an exclusive right to the patents and therefore capital receipts The Special Commissioners held that the profits arose from the sale of the machines and that the patent rights were given in order to make the machines mere saleable. Rowlatt, J. found that there was enough evidence before the Special Commissioners to arrive at the finding.[48]

Leasehold—Sale of—Receipt from—

A owned the leasehold of a property subject to a ground-rent of £300. The property was sub-let to B for a gross rent of £1,625. A contracted to sell his interest to B by two deeds. The

(46) *Constantinesco* v *The King*, 11 Tax Cases 730

(47) 7 A. T C. 42

(48) *Brandwood* v *Banker and C I E*, 14 Tax Cases 44, 7 A T. C 208

first deed assigned to B the property for the remainder of the lease subject to the payment of the ground rent to the landlord, the consideration being the payment of £1,000 by B to A Under the second deed B agreed to pay to A £1,625 per annum by quarterly payments for the remainder of the term of lease No sum was settled in lump as the price of the property *Held,* that the quarterly payments were income and not capital

Per Walton, J—It is obvious that there will be cases in which it will be very difficult to distinguish between an agreement to pay debt by instalments and an agreement for good consideration to make certain annual payments for a fixed number of years

In the one case there is an agreement for good consideration to pay a fixed gross amount and to pay it by instalments in the other, there is an agreement for good consideration not to pay any fixed gross amount but to make a certain or it may be an uncertain number of annual payments The distinction is a fine one and seems to depend on whether the agreement between the parties involves an obligation to pay a fixed gross sum [49]

Land—Price of—Received by local authority from Company—

Under an agreement between a local authority and a company the authority purchased the site and erected the buildings required for generating electricity and the company fitted up plant for the undertaking The company received the profits but paid the authority every half year the amount paid in the previous half year by the authority in repayment of the debt incurred by the authority in acquiring the land and erecting the buildings *Held,* that the half yearly payments made by the company were not capital [50]

Liquidation—Assets distributed—

A firm held shares in a number of single ship companies On the sale or loss of its ship each company went into voluntary liquidation and its surplus assets, including reserves set aside out of profits, and other undivided profits, both accumulated and current, were distributed *Held* that on the liquidation of a company undistributed profits can no longer be distinguished from capital and that the portion of the distributed assets, representing undivided profits, was not liable to tax [1]

Per Pollock M R—' These sums have not been distributed to the shareholders as dividends The voluntary liquidation has deprived the directors of the power of declaring a dividend The rights of the Crown and the subject must be governed by what is and not what might

(49) *Chadwick v Pearl Life Assurance Co* (1905) 2 K B 507

(50) *Surbiton Urban District Council v Callender Cable Construction Co.,* (1910) 74 J P 88.

(1) *Commissioners of Inland Revenue v Burrell,* 9 Tax Cases 27

have been Further it is a misapprehension after the liquidator has assumed his duties to continue the distinction between surplus profits and capital

Per Atkin L J— But (the liquidator) has no power to capitalise or decapitalise to distinguish in his distribution between capital and income His duty is simply to distribute assets In fact (the shareholder) receives his share of the joint stock as L J Scrutton said in the *Blott Case*[2] not income of the property but the property itself

There are suggestions by the Court of Appeal in the course of argument in *Commissioners of Inland Revenue v Wright*[3] that the decision in the *Burrell Case* might not apply to the payment of arrears of dividends by liquidators The decision in the *Burrell Case* has been got over in the United Kingdom by amendment of the law—*see* Finance Act of 1927

Advances—One man companies—

The assessee was the sole director and was in complete control of a limited company of which the whole of the share capital consisting of 2 500 £10 shares had been allotted to him in 1911 as part of the consideration for the sale to the company of his business Of these shares 2 499 had been continuously held by him until September 1917 when the company was voluntarily wound up The one remaining share had been given to a former employee from whom it was purchased in May, 1917, by the assessee s daughter The company had made considerable profits during the years 1911 to 1917 but had declared no dividends the profits made up to 1916 having been accumulated and used for the purposes of the business In the year 1916 17 the company under the authority of its Memorandum of Association, had advanced to the assessee without interest and without security various sums amounting in the aggregate to £6 531 which in the company s balance sheets were described as "Loans or Advances and these moneys were utilised by him to purchase War Stock in his own name In winding up the company's affairs in 1917 the Liquidator had not required the assessee to repay to the company the sums in question but had taken them into account in determining the share of the assets to which the assessee was entitled An assessment had been made upon the assessee upon the basis that the payments amounting to £6 531, made to him by the company in the year 1916 17 were in fact not ' Loans or Advances ' but constituted income received by him Upon appeal the Special Commissioners had found as facts (*inter alia*)—that the company was a properly constituted legal entity that it had power to make, and did make loans to

(2) 8 Tax Cases 101
(3) 11 Tax Cases 181

the assessee, and that such loans did not form part of the assessee's income, and they accordingly discharged the assessment

On appeal to the High Court Mr Justice Rowlatt ordered the case to be remitted to the Special Commissioners on the ground that they had not found as a fact whether the business had been carried on by the company or whether it had really been carried on by the assessee to the exclusion of the company

The assessee appealed against Mr Justice Rowlatt's order remitting the case to the Special Commissioners Judgment was delivered by the Court of Appeal against the Crown, with costs, their Lordships holding that by their findings of fact in the case stated the Special Commissioners had by implication found as a fact that the business was carried on by the company and not by the assessee[4]

The importance of this decision lies in its emphasis on such questions as the following being questions of fact, *viz*, whether a company is really doing the business of an individual, the company being a mere cloak, whether the loans are genuine loans or merely devices to distribute profits and evade income tax and so forth

'One man' Company—Loans—

The assessee was the controlling shareholder of five private limited companies From time to time he withdrew sums of money from each company, which were shown as 'loans' in the accounts of the companies The loans were not secured by any document, there was no provision for the repayment of interest and the companies did not pay any dividends One of the companies was liquidated voluntarily through the assessee as liquidator who did not settle the accounts with the shareholders but simply took over the business in the style of a firm and did not repay the loans taken by him The Special Commissioners held that the loans in question were not genuine loans and should be assessed as income of the assessee *Held*, that there was evidence before the Commissioners to support their finding of fact[5]

Private Company—Loans to shareholder written off—

In a private company the assessee and his brother held all the ordinary shares and by virtue of the articles the company was entirely under their control For some years the company had paid no dividend on the ordinary shares though it had made large profits On the other hand it had made large loans to the

(4) *Commissioners of Inland Revenue v Sansom* 8 Tax Cases 20
(5) *Jacobs v Commissioners of Inland Revenue* 10 Tax Cases 1

two brothers Under the articles the company could lend money and it was conceded by the Crown that the loans were *bona fide* loans On 31st December, 1919, the brothers owed the company about £283 000, and the company had large accumulated profits The brothers wanted to write off the loans but were advised by Counsel that a reconstruction was necessary for the purpose Nevertheless on the advice of their auditor the company wrote up the values of their assets by £226 000 and transferred this amount to a newly opened General Reserve to which they also transferred £57,000 from the undivided profits To the other side of this reserve they transferred the loans so that the reserve automatically vanished The Special Commissioner held that in effect the profits had been distributed as far as they could go (*i e* £117 000) to meet the sum of £283 000 *Held* reversing the decision of the Special Commissioners that the write off of the loans did not effect a distribution of the profits

Per Rowlatt J—Of course if a General Reserve Fund had been created in effect and allowed to live beyond its birth it would have appeared in the next balance sheet simply as a liability against the whole body of assets and if that had been divided say as a bonus dividend and if a bonus dividend had been divided to that amount that bonus dividend undoubtedly would have been good so far as the undivided profits existed to satisfy it It would not have gone against the general reserve in particular it would merely have been taken out of the assets of the company and it would have been good so far as there were profits to meet it But it seems to me perfectly clear that these people had no intention whatever of dividing their undivided profits up to the hilt What they purported to do in perfectly clear terms was this We are going to create a fund to give to these people to treat as belonging to these people in order to cancel their loans against us We are going to create a particular fund We are going to do it by writing up the assets to the tune of £226 000 We are going to put into it profits to the tune of £57 000 I cannot conceive how it can be said that the action of dividing whatever profits there might be beyond the £57 000 can be attributed to them Now supposing that the loan had been exactly of the same amount as the amount that was obtained by the inflation in the valuing up of the assets and they had said We will carry to General Reserve Account the amount by which we inflated the assets We will leave the exact amounts of the loans and we will carry to the Reserve Account the amounts of the loans too and so cancel them Could it then have been said Well although they have said nothing whatever about profits and are simply seeking to cancel the loan against the inflation of their fixed assets they are to be taken *nolentes volentes* as having distributed the undivided profits though they never hinted that they wanted to disturb the profits of the company in the smallest degree? I do not think it would have been said On the other hand supposing that the loans had amounted to just the same amount as the amount which they were taking from the profits and they had not inflated the assets at

all that would have been the strongest possible case for the *Crown* They have mixed the two together Now am I to hold that the Commissioners were entitled to dissect this combined fund so to speak and attribute £57 000—because I do not see that they could do more—*to the cancellation of the loan?*

There is another fact which in my judgment just turns the scale They sought to cancel these loans altogether I am conceiving the possibility that they cancelled them to the tune of £57 000 by the division of profits But the loans were not owing by the two brothers equally The £57 000 has got to be apportioned between them somehow either it has got *to be said that the loans were written off equally in point of amount* but not equally in proportion or I have got to say that there has got to be a distribution of profits not on the footing of equality between the shares because the brothers had the same shares but giving a greater dividend to one brother in order that he might have a proper proportion of his loan written off Whichever you do you have to mould the transaction into a shape that the people never intended it should bear *Non constat* that they would have written off any of the loan if they could not write it all off *non constat* that they would have written it off unequally as regards proportion *non constat* that they would have written off equally *as regards proportions and therefore unequally as regards amount* It seems to me that in the result I cannot hold that it is open to the Commissioners to say that they can treat this transaction as necessarily having the effect of a distribution of profits I can quite understand that when a series of acts are done and are called by a wrong name you can apply the right name to them and the Court is not to be constrained by language but it does seem to me here that what is sought to be done and has been done has gone beyond that and the Commissioners have taken it upon themselves to say that one set of facts shall be another set of facts [6]

The Court of Appeal following *Miles v New Zealand Alford Estate Co* [7] affirmed Rowlatt, J 's judgment The point stressed by that Court was that the debts due by the shareholders had not been validly cancelled *i e* the Directors still owed the loans to the company since there was no consideration in return for which the loans could have been cancelled

Sir D M Petit formed four private limited companies, each with a capital of between 30 to 40 lakhs, and owned all the shares excepting three preference shares (of Rs 10 each) in each company, these three shares being held by his subordinate employees Sir D M Petit paid for the shares allotted to him by agreeing to make over to each company a block of shares and securities of other concerns which he held but as a matter of fact he did not so make over the shares, each company, at the time of its formation appointing him or his nominee as trustee

(6) *Hall v Commissioners of Inland Revenue* 11 Tax Cases.
(7) 3? Ch D 283

for itself to hold the shares on its behalf and allowing him to keep the shares without formal transfer to the company until the company should call upon him to do so The shares were in Sir D M Petit's name When he received dividends and interest, book entries were made in each company crediting them with dividends and interest on securities, giving Sir D M Petit loan at 6 per cent without security or voucher Neither capital nor loan nor interest was ever repaid The memorandum of each company contained 38 objects but the companies did nothing beyond receiving dividends and giving loans to the assessee This continued for six years, during which period no dividend was declared by these four companies

Held, that the Income tax Officer could enquire into the genuineness of one man companies, though he should not start with the presumption that they are simulacra or shams, and that in this case there was evidence to justify the finding that the loans were not genuine *Held also*, that a formal transfer of shares is not in itself conclusive proof of the ownership of shares [8]

Annuity—Guaranteed—Ear marked for sinking fund—

The Nizam's Government guaranteed a company which constructed a railway in Hyderabad an annuity for 20 years of 5 per cent on the issued share and debenture capital, to be applied in paying interest on such capital and in forming a sinking fund for the redemption of the debentures, subject to provisions for repayment of the sums paid, with interest, out of profits earned *Held* that the whole annuity, including the sums applied to sinking funds, was chargeable with duty [9]

Foreign remittances—Capital or income—Question of fact—

An insurance society invested sums in Australia, interest accruing was retained abroad and invested, principal moneys periodically repaid to the Society's agent in Australia were mixed with other moneys in his bank account, and after varying intervals of time corresponding amounts were remitted to Scotland *Held*, that such remittances are not to be treated as remittances of capital but of interest It was a question of fact whether a remittance was of capital or of interest

Per the Lord President—"When however the question is whether particular remittances the real origin and character of which as capital or interest are not definitely established should be regarded as consisting of capital or of interest the fact that the amounts were entered in the accounts

(8) *Sir D M Petit v Commissioner of Income tax* 2 I T C 255

(9) *Blake v Imperial Brazilian Railway* 2 Tax Cases 58, followed *Nizam's Guaranteed State Railway Co v Wyatt* 2 Tax Cases 584

and treated as income in this country may be admissible evidence upon that question It further appears to me that under the circumstances indefinite remittances to this country must be presumed to consist of interest not of capital so long as the amount of capital remitted to Australia for investment still remains invested there"

Per Lord McLaren—But where a capitalist company as in the present case has invested large sums for a period of 15 years in a colony and has an agent employed not only to receive interest but also to receive the capital of the investment when paid up and to reinvest it even if unappropriated remittances are made to this country I think every one would agree that they must be dealt with according to the ordinary course of business and these remittances must be presumed to be paid in the first place out of interest so far as they are income and in the second place out of principal or capital I think that rule results from the fact that no prudent man of business will encroach upon his capital for investment when he has income uninvested lying at his disposal

Per Lord Chancellor—The mere nicknaming the sum received and ascribing to it because it is so named the character of capital and not of income cannot defeat the right of the Crown to have the tax levied upon that which in substance and truth is profit earned abroad but brought to this country

Per Lord Shand—The question is one of fact The amount of money which was sent out by the company as capital remains in Australia It has been gradually increased and not diminished The moneys that have come home were therefore in the nature of interest[10]

In *Murugappa Chettiar v Commissioner of Income tax*[11] the Madras High Court held on the authority of *Scottish Provident Institution v Allan* that money remitted to the head quarters of a firm in British India from its foreign branch must *prima facie* be presumed as having come out of profits rather than as a remittance of capital and that the burden of proof was cast upon the assessee to show the contrary

Dividend Equalisation Fund—Receipts from—

Several directors of a limited company of whom the assessee was one held between them all the ordinary shares therein Each year for five years in succession the company set aside out of profits certain sums as a reserve fund to be at the complete disposal of the directors for the time being and in particular as a provision for equalising dividends On the retirement or death of any director a proportionate share of this Dividend Equalisation Fund was payable to him or his legal representatives Some years later the company authorised the directors to distribute the Fund among the ordinary shareholders "as a funded

(10) *Scottish Provident Institution v Allan* 4 Tax Cases 591
(11) 2 I T C 139

debt payable at the option of the directors in cash or in fully paid preference shares at par", and four days later the directors resolved to pay the Fund in cash and to credit the amount to which each shareholder (director) was entitled, to his loan account with the company, but no special arrangement was made as to interest on the amounts so credited or for their redemption by the company The directors' loan accounts were used for crediting their fees, dividends and interest, and they were in the habit of withdrawing varying amounts therefrom from time to time Interest was allowed on these accounts at 5 per cent for two years, and thereafter at 6 per cent

Held, that the Dividend Equalisation Fund was receivable by the directors as income on the passing of the resolution authorising the distribution of the Fund and that the assessee's share of the Fund was therefore properly included in computing his total income for super tax purposes [12]

Special dividends—Obligation to purchase shares with them—Income, not Capital—

To enable a particular director to withdraw from the management of a company it was arranged that the remaining shareholders, of whom the assessee was one, should be placed in a position to buy the greater part of his shareholding In order to provide the remaining shareholders with funds for this purpose the directors recommended that £45,000 should be distributed out of the profits of the company by way of special dividend, and the retiring director further agreed to apply the special dividend on his own shares and the cash received for their sale in taking up £45,000 debentures in the company A few days later the company declared, out of accumulated profits, special dividends on ordinary and preference shares amounting to £60,000 in all, or £45 000 after deduction of income tax Prior to the passing of the resolution the assessee signed a letter authorising the directors to use his portion of the special dividend in payment of the consideration money for such of the retiring director's shares as were purchased by him, and similar letters were signed by the other shareholders With three exceptions the existing shareholders, including the assessee, duly applied their portion of the dividend to the purchase of shares from the retiring director, who in turn duly took up and paid for £45,000 debentures in the company

Held, that the transaction was in no sense a capitalisation of profits, that the special dividend was receivable by the shareholders as income, and that the arrangement, whether binding or

(12) *Commissioners of Inland Revenue v Blott*, 8 Tax Cases 101, distinguished, *Commissioners of Inland Revenue v Doncaster*, 8 Tax Cases 623

not, to apply it in the purchase of other shares in the company, could not affect the liability to tax[13]

Profits—Share of—Accumulated—

See *Hawley* v *Commissioners of Inland Revenue*[14] set out on page 260

Interest on securities—Sales cum' interest—Whether income of vendor or purchaser—

Under a contract of sale dated 29th November certain securities of a company were sold together with accrued interest The actual transfer was made on 14th December The books of the company were closed from 16th to 30th November, and the interest was paid by the company to the vendor, who made it over to the purchaser under the Rules of the Stock Exchange

Held, that the interest was the income of the purchaser and not of the vendor[15] In the hands of the latter it would have been a capital receipt This latter point arose in the following case in which stock was sold *cum* interest and it was held that the interest was included in the price

Per Roulatt, J— The truth of the matter is that the seller does not receive 'interest and interest' is the subject matter of taxation He receives the price of the expectancy of interest and that is not the subject of taxation You cannot put the case without relying on the theory that the interest accrues *de die in diem* If that could be said, it would be at any rate correct in point of figures and economics but that cannot be said The point of course is that there is no guarantee that when the due time comes the purchaser will get the interest So many contingencies might intervene[16]

It follows from this that what the vendor gets is part of 'capital' unless his circumstances are such that he is held to trade in such securities or shares

This view was endorsed (*obiter*) by the Patna High Court in *Rajniti Prasad Singh* v *Commissioner of Income tax*[17]

Sales 'cum' dividend—

On the 25th November, 1919, the assessee purchased certain shares in a company for a sum exceeding their par value by £50, the excess being expressed in the contract to be paid "to cover the portion of the dividend accrued to date" On the 13th May, 1920, a dividend of 10 per cent free of income tax was declared and paid by the company for the year ending the 28th February, 1920 The assessee contended that, of the dividend so receivable on his shares, £50 plus income tax (*i e*,

(13) *Roe* v *Commissioners of Inland Revenue* 5 Tax Cases 613
(14) 9 Tax Cases 331
(15) *Commissioners of Inland Revenue* v *Sir John Oakley* 9 Tax Cases 582
(16) *Wigmore* v *Thomas Summerson & Sons* 9 Tax Cases 577
(17) I L. R 9 Pat. 194.

£71 in all) should be treated as capital in view of the terms of the contract of purchase

Held, that the transaction was in substance an ordinary one of purchase of shares, and that the sum of £71 in question could not be excluded from the assessee's taxable income[18]

Sales cum' dividend—Sale after declaration of dividend—

The assessee arranged with a financial corporation for the sale at a price of £3 per share of the whole of his shareholding, comprising 79,920 out of the total issued ordinary share capital of 80,552 £1 shares, in a company of which he was the Managing Director One of the conditions of the proposed purchase was that, prior to the transfer of the shares, the assessee, through his controlling interest in the company, should make the company declare out of the balance of its undivided profits a bonus or special dividend of 10*s* per share on its ordinary shares, the proceeds of which should be held by the assessee as part of the agreed purchase price The company duly declared such bonus or special dividend free of income tax, and free also of super tax up to a sum not exceeding £6,000 should a claim upon any shareholder for the latter tax arise by reason of the receipt of the bonus The assessee received from the company two months later, a payment of £39,960 in respect of the bonus or special dividend on his shares The terms of the agreement for sale were first included in a written document a month after he received the special dividend In that document the purchase price was stated to be £2 10 per share, but it was also stated that the assessee was entitled to, and had previously received, the bonus or special dividend of 10*s* per share, which had already been declared

Upon an appeal by the assessee the Special Commissioners held that the sum of £39,960 and the income tax applicable thereto constituted part of the purchase price of the shares and did not form part of the assessee's total income upon which he was liable to super tax

Held, that the evidence before the Special Commissioners did not justify the conclusion of fact that an enforceable agreement for sale had existed between the parties prior to the written agreement and that the bonus or special dividend therefore formed part of the assessee's income and had not been received by him on behalf of the purchaser[19]

Special provisions have been made in the United Kingdom in the Finance Act of 1927 in order to check the avoidance of super tax by sales *cum* dividend

(18) *Commissioners of Inland Revenue v Forrest*, 8 Tax Cases 704

(19) *Commissioners of Inland Revenue v Frank Bernard Sanderson* 8 Tax Cases 38

Super-tax—Free of—

In the above case of *Sanderson* £6,000 was paid by the company on account of the super tax payable by Sir F B Sanderson and the question was raised whether the amount was his 'income' *Held,* that it was part of the purchase price of the shares sold by him and not received by him in his capacity as shareholder and therefore not chargeable to any tax

Per Roulatt, J — One cannot look at it as a dividend, it is not one It is not a percentage on the shares it is with reference to an unascertained sum (As to unascertained — you cannot declare a thing free of super tax which would only come on next year, if it will please Parliament and to an amount in the pound which will please Parliament ') He was not entitled as against the company at any time to have his £6 000 It simply was a statement that the company would do what was anticipated This money came to him under and because of the execution of and not *before* the agreement "[20]

Accumulated dividends—

Mr Bason was a substantial shareholder in a group of 3 private companies, which pooled their profits A resolution was passed by the Directors of one of the companies that, after a dividend of 10 per cent had been paid, 1|3rd of the balance of profits should be given as a bonus to the working Directors Mr Bason objected to the resolution and brought a suit The money intended to be paid to the Directors was kept in suspense, and finally as a compromise the company, with the consent of the Directors, paid Mr Bason one lakh of rupees as his share of bonus It was held that this was merely an accumulated dividend paid out of accumulated profits and taxable in the year of actual receipt."[1]

Isolated transaction—Profit from—Capital or Income—

A company carried on business as Coal Merchants, Ship and Insurance Brokers, and as sole selling agent for various Colliery Companies In the latter capacity it was part of the company's duty to purchase waggons on behalf of its clients The company made a purchase of waggons on its own account as a speculation and subsequently disposed of them at a profit It was contended that, this transaction being an isolated one, the profit was in the nature of a capital profit on the sale of an investment *Held,* that the profit realised on this transaction was made in the operation of the company's business and was properly included in the computation of the company's profits

Per Sankey J — To begin with the waggons were not bought as plant and machinery for the purpose of the appellant company's trade

(20) *Commissioner of Inland Revenue v Sanderson* 9 Tax Cases 80
(21) *Bason v Commissioner of Income tax* (Cal) 2 I T C 5_3

. . . . . They were—I do not like to use for a moment in this connection the word 'capital'—no part of the capital bought for the purpose of the appellant company's trade and I do not think that the purchase price of the waggons when sold ever formed part of the capital of the business. It is expressly found that they had nothing to do with the purchase and sale of the waggons. Then it is admitted that these waggons were purchased for the purpose of resale. . . . I do not think that it is possible to say that the mere fact that it was an isolated transaction at once takes it out of the category of chargeable property. I think in most cases an isolated transaction does not fall to be chargeable but I think you have to consider the transaction and you cannot bring it down as a matter of law without regard to the circumstances. . . . . . . Although it is perfectly true that the transaction began with one purchase and ended with one sale, that I think is only a coincidence."[22]

Hired out goods—Sale of—Surplus from—Whether profits or capital—

A company manufacturing waggons used to hire out some of the waggons. Later on it sold the waggons and the question arose whether the profits from the sale of waggons were 'profits' or 'capital'. The company claimed that hiring waggons was a separate business from selling waggons and that profits from selling outright the former class of waggons were an accretion of capital. *Held* by the House of Lords that the surplus was trading profits, as there was only one business.[23]

Interest—Dividends wrongly paid—

In In re *National Bank of Wales*[24] it was held that when a former director repaid the liquidator with interest the amount of dividends wrongly paid out of capital, the interest was not taxable as it was of the nature of damages.

Interest—Included in damages—

Interest which is taken into account in settling the amount of damages is not 'interest' but part of damages, *i.e.*, it is a capital receipt and therefore not chargeable to tax.[25]

Interest—Security on—Pending appeal—

Pending an appeal to the Privy Council, the High Court stayed the execution of the decree in a suit for a partition of a Hindu undivided family on the condition that the party asking for the stay gave security and also paid interest at 6 per cent. on the above security which was paid to the other party. The

(22) *T Beynon & Co, Ltd v Ogg*, 7 Tax Cases 125

(23) *Gloucester Railway Carriage Co v. Commissioners of Inland Revenue*, 12 Tax Cases 720

(24) (1899) 2 Ch. 629.

(25) *Commissioners of Inland Revenue v Ballantine*, 3 A.T C, 716.

Privy Council dismissed the appeal and the interest periodically paid had not to be repaid The question arose whether it was income in the hands of the recipient *Held*, that it was income In lieu of the enjoyment of his property from which he would have derived income he received 6 per cent on the security amount The income was also not of a casual or non recurring nature [26]

Discounted Bills—

A payment to a Bank in respect of a discounted bill drawn in the ordinary course of trade in selling goods which the drawer is unable to meet is not a capital loss but a trading loss Similarly, any repayment by the Bank on account of such a transaction is a trading receipt and not a capital receipt [27]

Compensation—Cancelled contracts—

To decide whether compensation for cancelled contracts is capital or revenue, one must look at the intrinsic nature of the business In the course of business one enters into a great number of contracts, some of which are fulfilled, some broken and others terminated So long as the assessee has no less power than other persons to terminate his contracts upon terms mutually acceptable, *e g*, if he does not enter into a restrictive covenant preventing him from undertaking other contracts, the compensation for closing a contract is merely the price paid for immediate freedom in the course of business from the responsibility for executing the particular contracts and not the price received as compensation for a burden thrown on the assessee not to carry on the trade It was held accordingly that the compensation received by a ship builder for the cancellation of contracts to build certain ships was not a capital receipt [28]

See also *John Smith & Sons v Moore*,[29] set out under section 10 (2) (ix).

Following *Hall v Commissioners of Inland Revenue*,[30] Sargant, L J said in *Short Bros Case* [28] "You cannot stop at one definite period and say 'Here was a contract, the contract must be looked upon as an equivalent to the sale or purchase of an annuity, payable at fixed dates, of a definite amount, and therefore any sum received in lieu of the contract being carried out must be looked at as a capital sum received for the surrender of the annuity' "

(26) *Jagmohan Das Rastogi v Commissioner of Income tax United Provinces, Lucknow* 3 I T C 274

(27) *[illegible] v [illegible]* 13 Tax Cases [illegible] I T C 10[illegible]

(28) *Short Bros v Commissioners of Inland Revenue* 12 Tax Cases 955

(29) 12 Tax Cases 266

(30) (1921) 3 K B 152, 12 Tax Cases 382

A company running steamships had a running contract for the supply of coal Owing to the reduction in the number of ships it found itself with too much coal and transferred the benefit of the coal contracts to another company in return for a premium. It was contended that this premium was a capital receipt arising out of the sale of a contract and that it was a casual transaction *Held,* that the receipts were trading receipts [31]

Per Rowlatt, J—" On the facts I think this is simply a case of a person who is bound to buy a certain amount of consumable stores, who over buys it and is lucky enough to dispose of these consumable stores which he has got in the way of his business in relief of his business at a profit "

The assessees who were chalk merchants and owned quarries entered into a contract to supply chalk to a person for ten years and had under the contract to have a wharf for the loading of chalk The contract was subsequently cancelled and the assessees received compensation which they used for writing down the value of the wharf on their books The wharf was not required for their other business *Held,* following the case of *Short Bros* v *Commissioners of Inland Revenue,* that the compensation was really a new form of profit in lieu of that under the contract and therefore a trading receipt and not a capital receipt [32]

The compensation paid for the detention of ships during the coal strike by the Customs under orders of the Ministry of Shipping for a period of 15 days was considered to be taxable even though there was no formal chartering or requisitioning of ships by Government The assessee claimed that the compensation was in the nature of damages for personal injury to a professional man The *ratio decidendi* was that the compensation was really in the nature of payment for the time and profit lost by the vessels during their detention The *Glenboig cas* was distinguished on the ground that in that case the compensation was for the sterilisation of the source of income (Court of Appeal) *Ensign Shipping Co* v *Inland Revenue* [33]

In *Charles Brown & Co* v *Inland Revenue,* (9 A T C 15—C A), the Government who controlled the works of the assessees during the Great War allowed them to go on with their business but merely restricted buying and selling prices Compensation was paid to the assessees on account of the deficiency

(31) *George Thompson & Co* v *Commissioners of Inland Revenue* 6 A T C 952

(32) *Commissioners of Inland Revenue* v *Northfleet Coal and Ballast Co* 6 A T C 1030

(33) 7 A T C 130

of profits below a certain normal standard *Held*, that the compensation was not capital but the income of the assessee's business[34]

A lump payment paid to an employee by his employer in satisfaction of a claim by the employee that he was a partner in the employer's business, which however was not admitted by the employer and which formed the subject matter of a pending civil suit between the two, was held by the Calcutta High Court to be a capital receipt The Commissioner misdirected himself in holding that because the employee had, according to him, no right as a partner and no reliable interest in respect of such receipt, the payment was an *ex gratia* payment in consideration of the employee's services Section 4 (3) (*vii*) does not apply to such cases since the payment arises out of business But it is not 'income' at all within the meaning of section 4

The case of *Turner Morrison & Co*, 3 I T. C. 214 was distinguished on the ground that, on the peculiar facts of that case, the payment was held to be not of a capital nature[35]

Stock—Purchase of—Undervaluation—

A company acquired for £25,000 the assets of another company in liquidation The assets stood in the books of the latter at £75,000 The £25,000 was apportioned between various items, £5,625 being taken against stock Stock was taken and the actual value was found to be £12,798 The question was whether this difference between £12,798 and £5,625 was taxable as profit

Held, by the Scottish Court of Session that the difference was not taxable, as no one could tell what was the exact price paid for each asset and there was only one alternative so far as stock was concerned *viz*, its real value[36]

Rent dependent on capital and interest—Deduction of income-tax from—

A local authority raised a loan and purchased a tramway. The loan was repayable in half yearly instalments with interest spread over thirty years The tramway was leased to another local authority for such a rent as should enable the lessors to repay the principal and interest of the loan in thirty years The lessees claimed that they could deduct income tax from the payments made by them whereas the lessors claimed that the net payment due to them after deduction of tax if any was such a sum as would repay the loan in thirty years *Held*, that the con-

(34) *See also Jesse Robinson and Sons v Inland Revenue*, 8 A T C 125
(35) *Mundy v Commissioner of Income tax, Assam.*
(36) *Craig (Kilmarnock), Ltd v Cowperthwait*, (1914) 51 Sc L.R 321

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(35) *Mundy* v *Commissioner of Income tax Assam*.

(36) *Craig (Kilmarnock), Ltd* v *Cowperthwait*, (1914) 51 Sc L R 221

tention of the lessees was correct[37] That is to say, the payments were income and not repayments of capital in instalments

Debenture—Trust deed—Payment of interest—Whether capital or income—

Under a debenture trust deed arrears of interest had to be paid before the principal A debenture holder having commenced an action, the Court directed that the trusts should be given effect to The rates of interest on the debentures varied The Court distributed the funds from time to time to the debenture *holders in proportion to the amounts due to them for interest* These funds consisted of rent and royalties from which income tax had been already deducted Afterwards the assets were sold and the Court was asked to make a final distribution It was contended that the payments already made to the debenture holders were payments of capital

Held by Farwell J, that as the debenture holders did not possess the same interests and the deeds provided for payment of interest before principal the debenture holders could not waive their rights under that provision in the absence of agreement of all the debenture holders, although the provision was inserted in the deed for the benefit of the debenture holders and that *the payments made must be in accordance* with the terms of the deed and that income tax must be deducted from such payments as had not already borne the tax[38]

In another case of a similar debenture trust deed in which there had been similar default and the Court had ordered the carrying into execution of the trusts it was held on the facts of the case and on the construction of the orders directing payment that, as it was clearly to the benefit of the debenture holders that the payments should be appropriated to principal, they ought to be so appropriated without putting the payees to their election and that no income tax should be deducted[39]

Application of Act

4 (1) Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India

Scope of this section—

The marginal note against section 3 is 'charge of income tax' and that against section 4 is 'application of Act' Section 3

(37) *Poole Corporation v Bournemouth Corporation* (1910) 103 L T 858
(38) *Re Queensland Land and Coal Co Davis v Martin*, (1903) unreported.
(39) *Smith v Law Guarantee and Trust Society C A* (1904) 2 Ch 569

defines who has to pay, i e, every individual, company, etc, on what he has to pay, viz, the income, profits and gains of the previous year, and at what rates, viz, the rates imposed by the Finance Act every year Section 4 circumscribes the scope of section 3 by defining and limiting the nature of the income that may be taxed It is not all income, profits and gains of the previous year, but only certain kinds of income that may be taxed

The Act applies to all income, from whatever source derived, (a) accruing in British India, or (b) arising in British India, or (c) received in British India, or (d) deemed to accrue, arise or be received in British India

Note that residence does not affect liability to tax except in certain cases under (d)

See below regarding the meaning of 'accrue' and 'arise'

See notes under section 4 (2) regarding the meaning of 'receive'

As regards (d) above see sections 4 (2), 7 (2), 11 (3) and 42 and notes thereunder Under these sections income accruing, arising or received outside British India is deemed to accrue, arise or be received in British India This is of course quite different from declaring that income not received at all shall be deemed to have been received As regards the latter classes of income, *see* sections 18 (4), 58 E and 58 J (3)

History—

In the Act of 1886 'income was defined as

> Means income and profits accruing and arising or received in British India and includes in the case of a British subject within the dominions of a Prince or State in India in alliance with Her Majesty any salary annuity pension or gratuity payable to that subject by the Government or by a local authority established in the exercise of the powers of the Governor General in Council in that behalf

that is, it corresponded partly to section 4 (1) and section 7 (2) of the present Act, and the charging section ran as below

> Subject to the exceptions mentioned in the next following section there shall be paid in the year beginning with 1st April 1886 and in each subsequent year to the credit of the Government of India or as the Governor General in Council directs in respect of the sources of income specified in the first column of the second schedule of this Act a tax at the rate specified in that behalf in the second column of that schedule '

In the Act of 1918 a separate definition of 'income' was dropped and the necessary changes were made in the charging sections The words 'accrue and arise' were altered to 'accrue

or 'arise' an important change which has avoided the necessity for discussion as to the difference between the concepts 'accrue' and 'arise' The new charging sections ran as below

Section 3 (1) Save as hereinafter provided this Act shall apply to all income from whatever source it is derived if it accrue or arises or is received in British India or is under the provisions of this Act deemed to accrue or arise or to be received in British India

* * * * * * *

Section 14 (1) The aggregate amount of an assessee s income chargeable under each of the heads mentioned in sections 6 to 11 shall be the taxable income of the assessee

(2) Subject to the conditions hereinbefore set out there shall be levied in respect of the year beginning with the first day of April 1918 and in respect of each subsequent year by collection in that year and subsequent adjustment as hereinafter provided upon every assessee in respect of his taxable income at the rate specified in Schedule I etc etc

These sections have been replaced by sections 3 and 4 (1) of the present Act and the Finance Act of each year

As regards the effect of the changes in 1922 *see* notes under section 14

'*Save as hereinafter provided* —This clearly refers to the exemptions under section 4 (3) the exemptions granted by section 60 and to special provisions like those which take into account the income outside British India of non residents in order to determine their title to refunds under section 48

'*Apply*'—The word '*apply* is a word of somewhat in definite connotation It obviously means that income to which the Act does not apply shall not be taken into account for any purpose under the Act[40] On the other hand the income to which the Act applies can be taken into account for some purpose or other defined in the Act Thus it is not necessary that income to which the Act applies should be taxed It may be taken into account merely in fixing the rate of tax—*see* section 16

Income profits and gains—

See notes under section 3 Capital receipts are excluded

As described or comprised in section 6—

There is no special point in the alternative words 'described or 'comprised'

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(40) *See per* Krishnan J in *Commissioner of Income tax v Arunachalam Chetty* 1 I T C 89

From whatever source derived—

The meaning of this is not clear A similar phrase is used in the law in the U S A and there it has been used in order to catch realised appreciation in capital values which is taxed neither in India nor in England The evident object of the framers of the Indian Act is merely to refer to the sources in section 6, and in this view the words "from whatever source derived" are mere surplusage (*See also* notes below)

Accrue or arise—Meaning of—

There are at least four different elements in the concept 'accrue'—(1) that of *time*, (2) that of *place*, (3) that of *source*; and (4) that of the *person* to whom the income accrues

The element of time arises principally in deciding *when* income should be taxed This question is dealt with in the notes under section 13 *See also* section 4 (2) as regards remittances from abroad Once income has accrued, that is, assuming that the 'time' factor has been solved, the liability to tax is determined by the other three factors only In practice, however, it is more usual to settle the liability to tax with reference to the other three factors and then consider the 'time' element when computing the income liable

If 'accrue *in*' a place means to be derived from a source in or earned in that place, there is no separate element of source to be considered The two elements merge into one But if it means something like a right to receive the income in that place and nothing else, and has no reference to the origin or the source of the income, the place of accrual may not be the place where the income originates or is earned

In all cases, wherever and whenever income may accrue, it must accrue to some person who is the person sought to be taxed

As section 4 (1) is worded it takes no account of the person to whom the income accrues All that it requires is that the income should accrue or arise or be received in British India or be deemed to accrue, etc, before it can be taxed It is the same thing whether the person to whom the income accrues is a resident or not except in certain cases in which income is deemed to accrue, etc, in British India In this respect it differs radically from the English law The only question with which we are therefore left is what is meant by accrual *in* a place Does accrual merely mean receivability in that place or does it involve the concept of the income either being earned in that place or being derived from a source of income situated in that place?

The arguments in support of the former construction are the following —(1) The words 'from whatever source derived'

become surplusage if they merely refer to the sources described in section 6 The only meaning to be given to these words, if we are not to treat them as surplusage, is to construe them as referring to sources both within and outside British India That is to say, all income which accrues, etc, in British India is taxable irrespective of the location of the origin or source of the income In that case obviously the word 'accrue' cannot mean earned or derived from a source in British India, and the only meaning to be given is that of receivability (2) Section 42 contemplates the 'accrual,' outside British India (unless the income accrued outside, there would be no object in 'deeming' it to accrue inside), of income to a non resident, from 'business connection' or 'property' in British India Even 'business connection'—whatever it may mean—clearly connotes that the source of income if not actually or wholly in British India has either some connection with British India or lies partly in British India The idea of earning—apart from receiving—something outside India from a source which is at least partly in British India is somewhat difficult to explain Doubts have been felt whether 'property' in section 42 (1) means the same as 'property' in section 9, if it does, as the Bombay High Court have said *obiter* in the *Bombay Trust Corporation Case*[41] the word 'accrue' in that section cannot mean 'earned' or 'derived' Even if 'property' were construed in a wider sense, it would still be the case that the source of income, or at least some part of it whether corporeal or not was still in British India whereas the income 'accrued' outside (3) Sec 4 (2) also suggests that "accruing" refers to receivability rather than to the place of origin In these circumstances it can be argued that 'accrue' means something else than earned or derived

On the other hand, (1) sub section (2a) of section 18 clearly assumes that salaries payable to a Government servant out of India by or on behalf of Government are taxable, *i e*, they 'accrue' or 'arise' in British India within the meaning of section 4 (1) This is possible only if 'accrue' means earned (2) The fact that pay, leave salaries and pensions paid out of India by the Government of India have been exempted under section 60 shows by implication that they are taxable This is possible only if 'accrue' or 'arise' is equivalent to 'earned' It must be admitted, however, that this is not altogether in consonance with section 7 (2) which assumes that salary paid to a Government servant in India but outside British India does not 'accrue' in British India This might be reconciled on the footing that sec

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(41) 3 I T C 135

tion 7 (2) applies only to salaries which are neither earned nor received in British India, e g the case of Political Officers accredited to Indian States But in that case the difficulty still remains —why should it be necessary to exempt the salary of officers on *duty* outside India? It may be possible to argue that leave salaries and pensions are in the nature of deferred pay, and that even though the officer is neither resident in British India nor receiving leave salary or pension in British India the leave salary and pension are 'earned' in British India But the case of an officer on duty, say, in England is no different from that of a Government servant on duty in an Indian State inasmuch as in either case the income is neither earned (accrues) nor received in British India, and it follows that either section 7 (2) or the exemption about pay of officers on deputation in the United Kingdom or a *Colony is superfluous It is submitted that the latter is superfluous*, and also possibly the exemption about leave salary and pension paid out of India to an officer not residing in India The taxation of overseas pay, however, rests on a different footing, and there can be no doubt that it is earned in British India The position regarding salaries, leave allowances and pensions paid out of British India is in a welter of confusion as will be seen above (3) The more natural meaning of 'accrue' or 'arise,' and more particularly the latter, when used only with reference to a place and without reference to a person or source is to connote something springing up from the place, i e from a source in it—*see* the authorities cited in the—judgment of Oldfield, J in *Board of Revenue v Ramanathan Chetti*[42] The idea of 'receivability' is less natural and is usually imposed only by the necessity of the context in construing a particular Act or Acts, as in the United Kingdom See *Colquhoun v Brooks*[43]

The expressions 'accrue' and 'arise' have been construed in other countries but these constructions cannot be followed in India on account of the difference in the wording of the Acts In *Commissioners of Taxation v Kirk* (cited *infra*), a case from New South Wales, it was held by the Privy Council that 'accrue' or 'arise' meant the same as 'derived' but the case was distinguished from English decisions on the ground that the language and aim of the United Kingdom statutes were different In two New Zealand cases also—*Commissioners of Taxes v Lovell and Christmas* and *Commissioners of Taxes v Eastern Extension, etc, Telegraph Co* (*infra*), 'accrue' was held to mean the same as derived On the other hand, in the United Kingdom it was held in *Colquhoun v Brooks*[43]—that 'accrue' meant only a 'right

(42) 1 I T C 37
(43) 2 Tax Cases 490

to receive' (per Fry, L J, in the Court of Appeal—the judgment was reversed by the House of Lords on different grounds altogether).

None of these decisions, as already stated, can be applied to India In the Colonial cases the statutes used the word 'derived' more or less as a variant to 'accrue' or 'arise', while in the English law the idea of accruing *to a person* resident in the United Kingdom is prominent

Further the United Kingdom law uses the words "accruing or arising" while the Indian law uses "accruing or arising or received" It is clear therefore that the Indian law contemplates income payable in British India being normally caught by the word "received" It follows that it is more correct to hold that 'accrue or arise' in this section mean something else than "is receivable"

In India the meaning of the words has been considered in the following cases —*Commissioner of Income tax v Ramanathan Chetti* (*infra*)—the point in issue being whether income from business abroad not remitted to British India 'accrued' or 'arose' in British India because the business was subject to general supervision by the owner from British India, *Commissioner of Income tax v Arunachallam Chetti*[44] (see section 13), in which the point was *when* income 'accrued', and *Rogers Pyatt Shellac Co v Secretary of State*[45] (cited under section 42) relating to profits accruing to a non resident from business connection in British India, in which M N Mookerjee, J quoted with approval the meaning given in *Colquhoun v Brooks*, but there are passages in his judgment which show that he inclined to the other view also In *Commissioner of Income tax v North Anantapur Gold Mines*,[46] however, in which the company contended that no profits arose or accrued in India because the sales were made in England and the money received there, the Madras High Court, while refusing a mandamus to ask the Commissioner to state a case on the ground that the High Court had no jurisdiction to do so, incidentally expressed the opinion that the profits had 'arisen' or 'accrued' in India, having regard to the difference in the wording of the Indian and the English Acts On the other hand, it was held by the Lahore High Court in the case of *Bhagat Jiwandas and others*[46a] that in the purchase of goods in British India for export no part of the profit accrues or arises in British India See also *In re the Aurangabad Mills*[47] and *Board of Revenue v*

(44) 1 I T C 75
(45) 1 I T C 363
(46) 1 I T C 133
(46-a) 4 I T C 40
(47) 1 I T C 119

Ripon Press and Sugar Mills,[48] in both of which, notwithstanding the location of the head office and the control in British India, it was held that the income accrued or arose outside British India.

These decisions, however, do not decide as between the 'earned' (or 'derived') theory and the 'receivability' theory On the other hand, in the *Rogers Pyatt Case* Chatterjee, J thought it

"possible to conceive of cases where a property may be situate in British India and the profits thereof may accrue or arise out of British India"

The Rangoon High Court held in the case of *Phra Phrai son Salarak*, 6 Rang 598, that the remuneration paid in Siam to a Siamese official for services rendered in Burma is not income 'accruing' or 'arising' in British India If it is the location of the source of income which has to be considered, the salary accrued or arose in Siam the Government of which paid the salary irrespective of where he worked, and if the place where the enforceable right to demand the income arises, also Bangkok 'Employment' in British India is not a *source*, see also *Pickles v Foulsham* (House of Lords)

In *Raja Bahadur Bansilal's case*, the Bombay High Court held that the interest on a debt contracted and repayable in British India accrues in British India even though the interest may in fact be payable outside British India The interest arises or springs from principal moneys invested in and repayable in British India, and the amount of such interest is calculated as a percentage on the principal moneys which constitute the source of the interest

In the *Bombay Trust Corporation case* (3 I T C 135) the same High Court held that interest on deposits made by a non resident finance company with a resident accrued from business carried on by the non resident in British India or from 'other sources' in British India (see section 6) even though the interest was payable outside British India, and the Privy Council agreed

It will be seen from the foregoing rulings that the test adopted has been more that of origin than that of place of receivability

In this view the words "derived from whatever source" in section 4 (1) become surplusage and are to be taken merely as reinforcing the meaning of 'accrue' or 'arise' as referring to sources in British India (This phrase as already observed has been used in American law but with quite a different object, *viz*, in order to catch the appreciation of capital values—which

(48) 1 I T C 202

neither under the English nor under Indian law is taxable) In sections 4 (2) and 42, however, 'accrue' must be construed as suggesting a 'right to receive', inasmuch as those sections stress the idea of the *person* to whom income 'accrues', and there would be no inconsistency between this construction and that of interpreting 'accrue' as being earned or derived when the word appears only with reference to the place of accrual and without reference to the person to whom the income accrues

But even if 'accrue' or 'arise' in British India be construed to mean to be earned or derived from sources in British India, the problem is one of difficulty when the profits arise from activities partly in and partly outside British India In this connection *see* the case of *Ramanathan Chetti* cited below

A somewhat difficult case is that of debts raised by residents in British India on which the interest is payable outside British India to non residents In such cases it is difficult to say where the interest is 'earned', more appropriately it is where the debtor could be sued for the debt or the interest, and the place of 'earning' becomes also the place of the 'right to receive'

It is also a question whether, when the contract is governed by foreign law and no suit in respect of it can lie in British *Indian* courts, and the non resident is not one of those in respect of whom the Indian Legislature has jurisdiction under section 65 of the Government of India Act, income resulting from such contracts and payable only abroad can be taxed at all, even though such income may be said to result ultimately from sources in British India or activities there

In *A T K P L S P Subrahmaniam Chettiar's case*, 2 I T C 365 (reaffirmed in *S V L L case*, 3 I T C 421), the Madras High Court held that in certain circumstances mere book keeping might suggest accrual of income in British India even though not received there

Interest on sterling securities of Government of India and of businesses in British India—

Where such interest is received by the debenture or security holder in British India, it is clearly liable to Indian income tax under section 4 (1), where, however, it is not received in British India, the tax will only be payable under the terms of the same section if the interest can be held to accrue or arise there "Accrue or arise" as used in this connection are general words descriptive of a right to receive, and in this view the relevant portion of section 4 (1) of the Act may be paraphrased by stating that the income to which the Act applies is income received in British India or income which there is a right to receive in Bri

tish India If this test is applied, interest on the sterling securities of the Government of India, if not received in British India, will not be chargeable with Indian income tax, and similarly the interest on sterling debentures issued by companies will not be chargeable if, as is usually the case, there is a right to receive it in England For the purpose of the test it is immaterial in what currency the security or loan and its interest is expressed, and consequently the same principle is also applicable in determining the liability to Indian income tax of the interest on foreign (other than sterling) debentures On the other hand, interest on promissory notes of the Government of India enfaced for payment in England is liable to Indian income tax, since here the right to receive payment of interest is a right to receive it in India, and the concession by which Government paper can be enfaced for payment of interest in London does not constitute any part of the actual contract entered into by Government (*Income tax Manual, para* 16)

Accrue—Arise—Difference between—

Under the Indian law *as it stands since 1918 it is* immaterial whether or not there is any difference between the meaning of the words 'accrue' and 'arise' but attempts have been made to distinguish between the two

The word accrues' seems to be the more appropriate word to be used in connection with a periodically recurring right to receive an income which is usually defined in amount while arises seems to be used more appropriately and frequently in connection with a business in which rights arise to receive income of a more fluctuating kind and at more uncertain intervals '[49 50] Strictly speaking accrues should not be taken as synonymous with arise but in the distinct sense of growing up by way of addition or increase or as an accession or advantage, while the word 'arises' means comes into existence or notice, or presents itself The former connotes the idea of a growth or accumulation and the latter of the growth or accumulation with a tangible shape so as to be receivable It is difficult to say that this distinction has been throughout maintained in the Act and perhaps the two words seem to denote the same idea or ideas very similar, and the difference only lies in this that one is more appropriate than the other when applied to particular cases [1]

Deemed'—

When a thing is to be 'deemed' something else it is to be treated as that *something* else with the attendant consequences, but it is not that something else When a statute enacts that

(49 50) Per *Sadasiva Iyer, J* in *Board of Revenue* v *Arunachallam* 44 Mad 6, 1 ITC 75

(1) Per *M V Mukerjee, J* in *Rogers Pyatt Shellac Co* v *Secretary of State*, 1 ITC 363

(2) Per *Cave, J—R* v *Norfolk Co* 60 L J Q B 380

something should be 'deemed' to have been done which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to.[3]

United Kingdom Law—

The relevant parts of Schedule D are as below. The other Schedules (for which *see* notes under section 6) excepting, to some extent, Schedule E (which relates to public offices, and annuities, etc, payable by the Crown or out of the public revenues), refer to sources of income in the United Kingdom.

1 Tax . . . . shall be charged in respect of—

(*a*) The annual profits or gains arising or accruing,

(i) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and

(ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere, and

(iii) to any person, whether a British subject or not, although not resident in the United Kingdom....from any property whatever in the United Kingdom or from any trade, profession, employment, or vocation exercised within the United Kingdom, and

(*b*) * * * *

2. Tax under this schedule shall be charged under the following cases respectively, that is to say—

Case I.—Tax in respect of any trade not contained in any other schedule,

Case II.—Tax in respect of any profession, employment, or vocation not contained in any other schedule,

* * * * *

Case IV.—Tax in respect of income arising from securities out of the United Kingdom except such income as is charged under Schedule C,

Case V.—Tax in respect of income arising from possessions out of the United Kingdom. . . .

RULES.

Case I.—The tax shall extend to every trade carried on in the United Kingdom or elsewhere . . .

Case II—The tax shall extend to every employment by retainer in any character whatever . . . and to all profits and earnings of whatever value arising from employments. . . . .

Case IV.—1. The tax . . . . shall be computed on the full amount . . . arising in the year of assessment, whether the income has been or will be received in the United Kingdom or not. . . .

(3) Per *Jones, L. J.*—*Ex parte Walton*, 17 Ch D. 756 (Stroud).

2 The foregoing rule shall not apply—

(a) to any person who satisfies the Commissioners of Inland Revenue that he is not domiciled in the United Kingdom or that, being a British subject, he is not ordinarily resident in the United Kingdom .

Case V—1 The tax in respect of income from stocks shares or rents, whether the income has been or will be received in the United Kingdom or not

2 The tax in respect of income from possessions other than stocks, shares or rents shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported or from money or value so received on credit or on account in respect of such remittances property, money or value brought or to be brought into the United Kingdom, etc

The English law, as will be seen, gives rise to various important problems First of all, is a person, whether an individual or a corporate body, a *resident*? This is the primary question to be settled If so, a minor question is, is he *ordinarily* resident? Next, how are we to distinguish between the following classes of trade trade wholly carried on in the United Kingdom, trade carried on partly in the United Kingdom and partly outside, and trade carried on wholly outside? This is also important because, unless the trade is wholly carried on outside, a resident is liable to tax on the whole profits, wherever arising, irrespective of its being remitted to the United Kingdom Then, in what circumstances can 'trade' be said to be 'carried on' or 'exercised' in the United Kingdom? Is a trade wholly carried on outside, a foreign 'possession'? What are 'securities' as distinguished from shares, etc? and so forth

As regards 'residence' the difficulty has generally been in respect of incorporated persons, that is, companies, and the Courts *have held that a company resides where its head and seat and* directing power reside and that it can so reside in more places than one *See* the cases set out under section 4 (2), (the *De Beers* group) In the Indian law 'residence' is not of much importance as will be seen from the notes under that sub section

As regards trade carried on partly in and partly out of the United Kingdom, it is a matter of much importance whether the business can be separated into two, so that the income from the trade outside can be taxed only on the part brought into the United Kingdom There is a large group of cases dealing with this problem—*The London Bank of Mexico group, infra*

As to when a trade is exercised in the United Kingdom, the question has been of importance in catching foreigners trad

ing in the United Kingdom This is a vexed question with a large number of rulings dealing with it—*The Sulley v. Attorney General group, infra*

Except the decisions about 'residence' which are not of much importance considering the Indian law, the other groups of decisions are not directly applicable to India where the provisions of the law are radically different At best they can be applied only inferentially, due allowance being made for the different scheme and wording of the Indian Act

COLONIAL CASES

Mines in New Zealand—Sales in London—Taxable in New Zealand—

Under the New South Wales Income tax Act, 1895, under which income "(1) arising or accruing to any person wheresoever residing, from any profession, trade, etc, carried on in New South Wales" or "(3) derived from lands of the Crown held under lease" or "(4) arising or accruing to any person wherever residing, from any kind of property . or from any other source whatever in New South Wales", was taxable, it was held in the case of a mining company that won and refined the ore in New South Wales but sold the product in England, that the profits accrued from business in the New South Wales

'The real question, therefore, seems to be whether any part of these profits were earned or (to use another word, also used in the Act) produced in the Colony This is a question of fact

At first sight, it seems startling that the ultimate result, in the form of profit, of a business carried on (as found by the special case) in the colony is not to some extent taxable income there, but if it cannot be brought within the language of the Act that must of course be the result Their Lordships turn to the construction of the Act The word 'trade' no doubt primarily means traffic by way of sale or exchange or commercial dealing, but may have a larger meaning so as to include manufactures But if you confine 'trade' to its literal meaning, one may ask why is not this income derived (mediately or immediately') from lands of the Crown held on lease under section 15, sub section (3) or from some other source in New South Wales under sub section (4) Their Lordships attach no special meaning to the word 'derived', which they treat as synonymous with arising or accruing It appears to their Lordships that there are four processes in the earning or production of this income—(1) the extraction of the ore from the soil, (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process, (3) the sale of the merchantable product, (4) the receipt of the moneys arising from the sale All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages The first process seems to their Lordships clearly within sub section (3), and the second or manufacturing process,

if not within the meaning of 'trade' in sub section (1), is certainly included in the words 'any other source whatever' in sub section (4)

'So far as it relates to these two processes therefore their Lordships think that the income was earned and arising and accruing in New South Wales

"The fallacy of the judgment of the Supreme Court in this and in *Tindal's Case*[4] is in leaving out of sight the initial stages, and fastening their attention exclusively on the final stage in the production of the income The learned judges refer to some English decisions on the income tax Acts of this country (United Kingdom) which in language and to some extent in aim differ from the Acts now before their Lordships The language used in the English judgments must of course be understood with reference to the cases then under consideration '[4a]

Company in London working as Commission Agents to Dairies in New Zealand—

A company carried on business in London as commission agents for provisions It had a salaried employee in New Zealand who had no other business Every year another servant of the company also went to New Zealand to arrange for the business The business was as below The produce was consigned to the London company directly by the consignors, who were local dairies Against these consignments, the dairies were granted advances through credits in New Zealand banks, opened by the London company The London company, however, acted only as commission agents, the unsold surplus being returned to the dairies in New Zealand and the sale proceeds less commission and expenses being made over to them *Held*, that the profits of the company were actually made in London and that the earlier transactions in New Zealand were insufficient to make the profits taxable as profits derived from business carried on in New Zealand The *relevant expression in the New Zealand Act* was 'derived from business carried on in New Zealand'

One rule is easily deducible from the decided cases The trade or business in question in such cases ordinarily consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit and the rule seems to be that where such contracts forming as they do the essence of the business or trade are habitually made, there a trade or business is carried on within the meaning of the Income tax Acts so as to render the profits liable to income tax But the decisions do not seem to furnish authority for going further back for the purpose of taxation than the business from which profits are directly *derived and the contracts which form the essence of that* business '[5]

(4) 18 N S W L R 378

(4a) *Commissioners of Taxation* v *Kirk* (1900) A C 588

(5) *Sulley* v *Attorney General* (1865) 2 Tax Cases 149 *Grainger* v *Gough* 3 Tax Cases 462, followed and *Erichsen* v *Last* 4 Tax Cases 422 distinguished, *Lovell and Christmas* v *Commissioners of Taxes* (1908) A C 47

International Telegraph Company—Profits from Telegrams from Port Darwin to Madras received through New Zealand—

A company with its head office in London owned submarine cables and did business—international telegraphy—in New Zealand, Australia and elsewhere In New Zealand the telegraph lines belong to the Government who alone can use the lines The Government received messages from the public together with the entire charge (*5s 2d* a word) and sent the message on to the nearest station of the company, after deducting a penny a word, being that Government's share of the message fee It was claimed by the New Zealand Government that the profits in respect of the telegrams were taxable even though the profits did not relate to the company's cables in New Zealand (the profits in question related to the lines from Port Darwin in Australia to Madras) nor were received by the company in New Zealand *Held*, that the profits from the telegrams from Port Darwin to Madras were not taxable as there was no contractual obligation on the part of the New Zealand Government to receive messages on behalf of the company and send them to their ultimate destination The profits therefore were not received by the company in New Zealand, either by themselves or by agents, nor were the cables from which the profits in question were derived within New Zealand There was no dispute as to the liability of the profits from the company's lines between New Zealand and the adjacent colonies [6]

CASES IN THE UNITED KINGDOM

Exercise of trade by foreigner—

A firm of New York where it had its principal business had a branch in England where one of the partners purchased finished goods for exportation to America where the goods were sold *Held*, that the firm did *not* exercise a trade in the United Kingdom

"Wherever a merchant is established, in the course of his operations his dealings must extend over various places, he buys in one place and sells in another But he has one principal place in which he may be said to trade *viz*, where his profits come home to him That is where he exercises his trade It would be very inconvenient if this were otherwise If a man were liable to income tax in every country in which his agents are established it would lead to great injustice "[7]

Danish Marine Cable Company—Lines abroad—Messages received in the United Kingdom—

A Danish Company had marine cables communicating with the Government telegraph lines in the United Kingdom The

(6) *Commissioners of Taxes v Eastern Extension, etc, Telegraph Company*, (1906) A C 526

(7) Per *Cockburn C J*—*Sulley v Attorney General* 2 Tax Cases 149

company had work rooms in the United Kingdom Telegraph messages from the United Kingdom were sent over the Government lines and thence through the company's cables to other countries The United Kingdom Post Office under an agreement collected the message fees and paid the company the fees after retaining what was due to the Post Office The company made no profits from the land lines in the United Kingdom *Held*, that the company exercised a trade in the United Kingdom

"Whatever the word 'exercised may mean it certainly includes carrying on and therefore carrying on trade is within that word I think a carrier who simply regularly undertakes the carriage of goods abroad for money paid in this country as part of his ordinary business, would be carrying on trade in this country although the whole of the carriage was done abroad "—Per *Jessel, M R*

"I think it would in the first place be nearly impossible and in the second place wholly unwise to attempt to give an exhaustive definition of what is a trade exercised in this country The only thing that we have to decide is whether upon the facts of this case, this company carry on a profit earning trade in this country I should say that whenever profitable contracts are habitually made in England by or for foreigners with persons in England because they are in England to do something for or supply something to those persons such persons are exercising a profitable trade in England even though everything to be done by them in order to fulfil the contracts is done abroad '—Per *Brett, L J* (quoted with approval by Lord Herschell in *Grainger* v *Gough*) [8]

' Whenever a foreigner either by himself or through a representative in this country, habitually does and contracts to do a thing capable of producing profit and for the purpose of producing profit he carries on a trade or business '—Per *Cotton L J* (quoted with approval by Lord Watson in *Grainger* v *Gough*[8]) [9]

French wine firm—Selling in England through a London firm—Trading in the United Kingdom—

A firm of wine merchants resided and carried on business in France The senior partner visited England every year for about 4 months, when he saw customers and took orders from English merchants A London firm acted as agents for the French firm A room was provided in the office of the London firm for the use of the French firm's senior partner, for which the latter paid rent The French firm's name was painted on the premises and the firm had its own clerk The wine ordered and sold was shipped from France, and the bills of lading and invoices

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(8) 3 Tax Cases 462

(9) *Erichsen* v *Last*, 4 Tax Cases 422

were sent therefrom sometimes to the English agents and some times direct to the purchasers The English agents collected the monies and did such business as was not done by the senior partner during his annual visit The English firm received a commission and not salary The commission not only covered the expenses of the agents but a guarantee for debts *Held*, that the French firm exercised a trade in the United Kingdom [10]

Norwegian Ship Company—Chartering arranged by Glasgow firm—

A company incorporated in Norway had its registered office there in which the share list and books were kept and the share holders' meetings held There were two Managers, both in Norway The company owned a ship, the chartering of which was arranged by a Glasgow firm, who received the freight and spent it, retaining the balance till required for payment of dividends *Held*, that the foreign company exercised a trade in the United Kingdom [11]

French wine firm—Selling through an Agent in United Kingdom—

A French wine firm had a sole agent in the United Kingdom who received all out of pocket expenses plus a commission on sales The agent had no other business and his business premises were in his own name He employed travellers as well as sub agents for canvassing orders The orders when obtained were collected by the agent and sent to the French firm, the latter complying with the orders either direct to the purchaser if the quantity was large or through the agent who had a small stock in England belonging to the firm The wines were invoiced in the French firm's name as vendors The goods were supplied from France at the purchaser's risk The French firm had a banking account in London All gains and losses went to the firm and did not affect the agent who simply canvassed orders and collected the money Bills and drafts were payable to the order of the French firm, and the agent always sent the bills to them for endorsement *Held*, that a trade was exercised in the United Kingdom [12]

French wine firm—Selling through London firm—

A London firm were sole agents to a French wine firm The prices were settled by the latter The London firm received an inclusive commission on *all* sales in England (whether through the agents or not) out of which they met their out of pocket

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(10) *Tischler v Apthorpe* 2 Tax Cases 89
(11) *Wingate v Webber* 3 Tax Cases 569
(12) *Pommery and Greno v Apthorpe* 2 Tax Cases 182

expenses The English premises were in the London firm's name The French firm's name was published in the London Directory with the English agent's address No wine was stocked in England The wine was advertised by the agents, price lists and circulars being issued by them under the authority of the principals The orders were collected and sent to France whence the wine was consigned direct to the purchasers in the French firm's name as vendors Payments were made either in France or through the agents in London The French firm had no banking account in England Formal receipts were sent by the French firm to all purchasers It was conceded by the assessee that the contracts were made in the United Kingdom *Held*, that the foreign firm exercised a trade in the United Kingdom

Getting the order is the foundation of the trade The making of the contract is the foundation substance and essence of trading To constitute trading in this country by a foreign firm it is not necessary that the payment for goods sold should be made here " —Per *Brett, M R*

Trade may be carried on in England without an establishment at all —Per *Lopes, L J*

In the present case the appellants have an agent or agents residing within the United Kingdom, who according to my conclusion from the facts had the receipt of profits and gains, not, it is true, after they have been ascertained as such by the deduction from the gross income of the expenses *and outgoings but as a part of the gross sum which is paid to* them It is obvious that whatever profits and gains there may be from the business exercised within this country they must be part of the sums which are received by the agents, and I think they are not the less in receipt of profits and gains because they are in receipt of something else as well "—Per *Fry, L J*[13]

French wine Merchant—Advertised by an English firm—Supply from France—

An English firm acted as agents for a French wine merchant The English firm canvassed for orders and sent them when obtained to the French merchant who used his discretion in executing them The wine was sold "delivery ex warehouse" in France, *the purchaser taking all the risk and cost of freight*, etc Payments were made sometimes direct to the French merchant and sometimes through the English firm The principal's name appeared in the London Directory *Held*, that the French merchant did not exercise a trade in the United Kingdom

Per *Lord Herschell*,— ' In all previous cases contracts have been habitually made in this country Indeed this seems to have

(13) *Werle & Co* v *Colquhoun* 2 Tax Cases 40?

been regarded as the principal test whether trade was being carried on in this country In the case of a trade exercised in this country, I think any agent who received, for the foreigner exercising such trade, moneys which included trade profit, would be within the provisions of section 41 In the first place I think there is a broad distinction between trading *with* a country and carrying on a trade *within* a country Many merchants and manufacturers export their goods to all parts of the world yet I do not suppose any one would dream of saying that they exercise or carry on their trade in every country in which their goods find customers "

Per *Lord Watson*—"I agree with the opinion expressed in that case (*Erichsen v Last*) by Cotton, L J, that whenever a foreigner, either by himself or through a representative in this country, 'habitually does, and contracts to do, a thing capable of producing profit and for the purpose of producing profit, he carried on a trade or business', and that the profits or gains arising from these transactions in the United Kingdom are liable to income tax There is no substantial difference between obtaining orders for wines according to the method pursued by Louis Roederer and attracting customers to Rheims by advertising and sending circulars to the trade in England I do not think that the employment of an English agent to collect and remit the debts due by the purchasers can be regarded as an exercise of trade in this country by the foreign merchant there may be transactions in my opinion by or on behalf of a foreign merchant in this country so intimately connected with his business abroad that without them it could not be successfully carried on which are nevertheless insufficient to constitute an exercise of his trade within the meaning of Schedule D "

Per *Lord Davey*—"Canvassing for custom is no doubt ancillary to the exercise of trade, and it may be assumed that Mr Roederer's trade with this country is increased by the employment of agents for the pur pose as it might be by systematic advertisement But Mr Roederer's trade is selling his champagne, and he exercises that trade where he makes *his sales and the profits come to him Nor do I think that it makes any* difference that it is within the scope of Messrs Grainger's authority to collect moneys for Mr Roederer It is in my opinion no more than if Mr Roederer were for the convenience of his customers to open a banking account in London to which they might pay what they owe him "[15]

Foreign firm selling goods in England through an English firm on commission—

A foreign firm used to consign goods to an English firm for sale on commission The latter sold the goods in their own name, collected the monies and assumed all the responsibility for the payments Full accounts were rendered to the foreign firm

(14) 4 Tax Cases 4?2
(15) *Grainger & Son v Gough* 3 Tax Cases 462

both gross receipts and expenses being shown and the commission deducted *Held*, that the foreign firm exercised a trade in the United Kingdom[16]

New York Company selling through an English firm as agents—

An English firm acted as agents to a New York company The agents submitted all orders to the principals who rejected orders as they liked, and the agents accepted the orders only after obtaining the principal's authority Goods were shipped *f o b* Boston and consigned to the agents at Liverpool who distributed the goods to the customers Most of the sale proceeds was collected by the agents and subsequently remitted to Boston by drafts In some cases, customers forwarded their acceptances direct to the principals *Held*, that the contracts for, as well as the delivery of, the goods were made in the United Kingdom

Per *Wills, J* —' Even if the contract had been made in New York, an executory contract for sale a man cannot get his money and can make nothing out of it unless he delivers the goods in this country, when he does deliver the goods in this country he exercises a trade and carries on a business '[17]

French Company—Glasgow firm sole agents—Contracts made in England—Supply of goods outside United Kingdom—

A Glasgow firm were sole agents in the United Kingdom for a French company with phosphate mines in Algeria Contracts were entered into by the agents on their own authority subject to minimum prices fixed by the principals There was no stock in the United Kingdom The agents appointed sub agents all over the United Kingdom but subject to the company's approval Delivery of goods was outside the United Kingdom The contract required price to be paid 'by cash in London' but in practice crossed cheques were received, sometimes in favour of the agents and sometimes in that of the company No cheques were cashed by the agents, and all were sent to France The company had no banking account in the United Kingdom The agents were remunerated by a commission *Held*, (1) (Lord Dundas dissenting) that the company did not exercise a trade in the United Kingdom, and (2) that the agents were not in "receipt of any profits" of the principal[18]

But this decision has been overruled

' The decision in *Crookston* v *Inland Revenue* may probably be supported for the second reason given by the Court *viz*, that

(16) *Watson* v *Sandie and Hull* 3 Tax Cases 611
(17) *Thomas Turner* v *Rickman* 4 Tax Cases 25
(18) *Crookston Bros* v *Furtado* 5 Tax Cases 602

the profits there in question had not been received by the agents; but on the question first discussed namely as to the place where the trade was carried on I think that the reasoning of Lord Dundas is to be preferred to that of the other members of the Court "—Per Lord Chancellor Cave in *Maclaine & Co* v *Eccott* [19]

" It humbly appears to me that the judgment of the majority of the learned Lords of the second division (in Crookston's case) was erroneous I think that the weight of authority upon the subject in England was much too lightly treated "—Per *Lord Shaw*, *ibid*

Belgian yarn firm—Sale in United Kingdom through Agents—

A Belgian firm had agents in the United Kingdom for the sale of their yarn After obtaining the approval of the principals in each case, the agents entered into contracts in the United Kingdom on behalf of the firm The goods were sent to the agents who distributed them to the purchasers and received payment and gave final receipts Monthly account sales were sent to Belgium and also quarterly accounts for expenses and commission The agents received commission on business done but were liable for half the bad debts *Held*, that the Belgian firm exercised a trade in the United Kingdom [20]

Industrial Bank of Japan—Loans floated in United Kingdom—Collections through Banks in England on commission—

The Industrial Bank of Japan which had no office in the United Kingdom floated loans in the United Kingdom, subscriptions to which were received by three Banks in England The Yokohama Specie Bank collected these amounts (less commission etc) and remitted them to Japan or made them over to the Japanese Government's account in London The loans were floated with the consent of the Japanese Government whose consent was necessary to the Industrial Bank undertaking business outside Japan The Yokohama Bank from time to time acted as agents in the United Kingdom for the Industrial Bank but had no general agency power It was held that the Industrial Bank did not carry on a business in the United Kingdom [21]

Per *Rowlatt J*—"A man does not carry on business here because he employs a solicitor to act for him as his agent here

But the judgment was overruled by the Court of Appeal in *Maclaine & Co* v *Eccott*, on the ground that the Tokio Bank exercised, through an agent, the trade of floating loans in the United Kingdom

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(19) 10 Tax Cases 481
(20) *Macpherson & Co* v *Moore*, 6 Tax Cases 107
(21) *Yokohama Specie Bank Ltd* v *Williams* 6 Tax Cases 634

Dutch Incandescent Mantle Company—Selling through agents in United Kingdom—

The sole selling agents in the United Kingdom of a Dutch Company making incandescent mantles, were to sell the mantles at the best possible prices but to keep a day book of sales open to the inspection of the company at all times The company sold the goods to the agents at cost price *plus* 10 per cent The agents were to get 5 per cent commission for expenses and *del credere*, and the profits were to be divided Neither party bore the loss of the other The name of the company was not shown on the invoices but appeared on the brassplates of the agents' premises though there was no clear authority for it *Held*, (1) that there was evidence on which the Commissioners could find that the Dutch company carried on a trade in the United Kingdom, (2) that the English firm were agents in receipt of profits of the Dutch company

The *ratio decidendi* in this case was that though the absence of privity of contract between the foreign principal and the local purchaser, and the property in the goods having passed to the local agent were important features, yet it did not prevent the foreign principal being considered to 'exercise a trade' through the agent A man may act through an agent even though the acts of the agent do not bind the principal, and it is not unusual for agents to obtain special property in goods secured by advances made to principals

Danish Machinery Manufacturers—London office for inspection of installation of machinery sold in England—

A Danish firm carried on business at Copenhagen as manufacturers of machinery There were two partners both of Danish nationality and both resident in Denmark The firm had an office in London in charge of an employee who ascertained the requirements of the customers, inspected the sites of the proposed installations and generally superintended the installation of the machinery when sold Contracts were arranged for and made directly from Denmark whence the goods were consigned *f o b* During the war the firm purchased parts of machinery in England and used them for repairs or for new installations, and it was conceded by them that the profit from the re sale of the goods purchased in England was liable to tax *Held*, that (except as regards the goods bought and sold in the United Kingdom) the evidence before the Commissioners did not justify the conclusion that the firm exercised a trade in the United Kingdom

(22) *Weiss Biheller & Brooks Ltd* v *Farmer* 8 Tax Cases 381 (C of A)

Per *M R Sterndale*—"I doubt if it is possible and in any case I do not think that it is necessary, to lay down an exact definition of what constitutes such an exercise of trade"

Per *Atkin, L J*—"There are indications in the case cited (*Grainger v Gough*[23]) and other cases that it is sufficient to consider only where it is that the sale contracts are made which result in a profit It is obviously a very important element in the enquiry But I am not prepared to hold that this test is decisive I can imagine cases where the contract of re sale is made abroad and yet the manufacture of the goods some negotiation of the terms and complete execution of the contract take place here under such circumstances that the trade was in truth exercised here I think that the question is where do the operations take place from which the profits in substance arise? " (approved by the H of L) *Smidth & Co v Greenwood*[24]

Foreign firm—Working through commission agent—Agent concluding contract—

A firm of cotton merchants in Egypt appointed an agent in Manchester for the sale of their cotton He was not described as their sole agent As a matter of fact the agent carried on no other business but he was at liberty to do so From time to time he received from the principal firm authority to sell specified quantities of cotton on terms fixed by the principals on each occasion He also obtained offers locally which he referred to the principals for acceptance or rejection In either event the contract was concluded by the agent in England No stocks were kept by the agent, and the goods were shipped directly by the principals *c i f* in Alexandria, and the invoices sent by *them* direct to the purchasers The bills of lading were sent to the purchasers through the ordinary commercial and banking channels, *i e*, in exchange for acceptances of bills drawn by the principals and discounted in Alexandria The agent at Manchester was in no way concerned with the payment for the goods, nor responsible for bad debts His remuneration consisted of a commission on sales out of which he met his own expenses *Held*, that the Egyptian firm were exercising a trade within the United Kingdom and were properly assessed in respect of the profits of that trade in the name of their Manchester agent who was an authorised person carrying on their regular agency[25]

In a case in which (1) the local agent received offers and communicated them to the foreign principal for acceptance, and the acceptance was communicated to the agent who passed it on to the local customer and made out and delivered "Bought and Sold Notes", and (2) the agent also received consignment busi

(23) (1896) A C 325 3 Tax Cases 462
(24) 8 Tax Cases 193
(25) *Wilcock v Pinto & Company* 9 Tax Cases 111

ness and sold by auction for commission, the agent meeting bad debts out of his pocket, it was *held* that (1) the communication of the agent to the customer constituted the acceptance of the contract which was therefore made in the United Kingdom, and (2) that the agent was a regular agent in respect of the consignment business[26]

"It does not follow that if you find a contract made abroad there is necessarily no trade exercised in England You may have in the subject matter of the contract work to be carried out in England by the foreign manufacturer and the foreign manufacturer may carry out all the work in England and receive payment in England These questions therefore *viz*, where the work is done or goods delivered and where payment is made are also of importance" See per *Scrutton, L J*, in *Belfour v Mace*[27]

Purchase for export—Sales in India—Indian law—

The place where the sale is effected and the price realised is certainly the principal place, but is not necessarily *the* only place of the accrual of profits

Cases decided under section 42 (1) cannot be extended by analogy Section 42 (1) creates a special legal fiction in the circumstances specified therein

Not only is there no provision identifying the place of the accrual of income with the place where the goods are purchased but on the contrary section 42 (3) indicates—either by a legal fiction or otherwise—that it is the place of sale and not the place of purchase which is the place of accrual of the profits

English cases furnish no guidance because of the difference in the scheme of the Acts *Commissioners of Taxation v Kirk*, can be distinguished because in that case the business was admittedly carried on in New South Wales, whereas the mere purchase of goods for sale abroad does not amount to the exercise *of a trade in the country of purchase* (*Sulley v Attorney General*)

If the assessee did not himself purchase the goods in British India but asked his agent abroad to order the goods from British India, no part of the profits could be assigned to any process performed in British India The same result would follow if the person exported his own goods, *e g*, raw produce of his land for sale abroad, *i e*, without purchasing them in British India Also, if the mere purchase of goods in British India makes it the place of accrual of a part of the profits, the

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(26) *Powson v Stephen* 8 A T C 141
(27) 13 Tax Cases 539 7 A T C 6

same result could be attributed to the passage of goods through British India in transit It was held, therefore, that in the case of a resident who purchases goods in British India and exports them for sale abroad no part of the profits accrues or arises in British India"[28]

The arrangement in British India of sales and the receipt of money in British India constitute trading in British India even though acceptance of the contract may be outside British India [*Tehri Case*, 1930 A I R (All) 389].

Danish Company—Trading through Agents—

Assessees were agents in England acting for Danish steamers Goods for shipment were brought in by consignors direct to the quay, and the agents put them on board The agents arranged for the berthing of the steamers, loading and unloading them, clearing through Customs, bunkering coal, and collecting freights The agents were responsible to the Danish shipowners for freight The agents' clerk signed bills of lading 'for the Master' The agents were remunerated by commission. *Held*, that the Danish owners exercised a trade in the United Kingdom through the agents[29]

Contracts between non-residents—

Per the Master of Rolls " profits on contracts made here (in the United Kingdom) for the shipment of goods from this country, whether the vendor has sold *f o b* or *c i f*. by residents here, or by non residents—if the proceeds are received here by the agents—are taxable Profits on contracts made here for the shipment of goods from Rotterdam to residents in the United Kingdom are liable Profits on contracts for shipment of goods from Rotterdam to this country made between non residents are not within the charge unless the profits thereof are received in this country "[30]

See notes under section 42 as to the difference between the Indian and the United Kingdom law in this respect

'Exercise a trade' and 'carry on business'—Difference between—

"The words 'exercise a trade within the United Kingdom' have no technical meaning and have been said by more than one learned judge to be synonymous with 'carry on business,'"—Per *Lord Salvesen* in *Crookston Bros* v *Furtado*[31]

But recently a distinction has been attempted

"The question is whether the profits brought into charge are 'profits arising or accruing' to the respondents 'from any trade . . .

(28) *Bhagat Jiwandas and others* v *Commissioner of Income tax, Punjab*, 4 I T C 40

(29) *Neilson, Anderson & Co* v *Collins* and *Tarn* v *Scanlan*, 13 Tax Cases 158

(30) *Muller Ltd* v *Lethem*, 13 Tax Cases 126

(31) 5 Tax Cases 619

exercised within the United Kingdom' within the meaning of Schedule D of the Income tax Act, 1853 The question is not whether the respondents carry on business in this country It is whether they exercise a trade in this country so that profits accrue to them from the trade so exercised ' —Per *Atkin, L J* in *Smidth & Co* v *Greenwood*[32]

The point of this distinction is not clear Either it is that without actually carrying on business in the country it is possible for the non resident to exercise a trade in the country so that profits accrue to him from the trade so exercised, in which case it would somewhat correspond to the difference between 'business' used in section 10 of the Indian Act and 'business connection' in section 42 of the same Act, or it is that, even though a person may carry on business (which is a wider term than 'trade') in the country, it might be that he is not exercising a trade from which profits accrue to him If what is meant is the latter, section 42 of the Indian Act which refers to 'business connection' brings within the ambit of taxation a wider area of income than the United Kingdom Acts

Business abroad—Whether separable from business within the country—

As already pointed out—*see* page 335, it is a matter of much importance under the English law whether the business of a resident, which is carried on outside is separable from that carried on in England In the case of a bank which had its headquarters in London and branches in Mexico and Lima, and the London office did not receive current banking accounts but merely did the London business of the branches, it was held that 'the bank does not carry on two businesses They have only one business, which they carry on in England It is true that part of the profits of that business carried on in England, is earned by means of transactions abroad but that is not carrying on the business abroad, it is carrying on the business in England by means of some transactions of it which are carried on abroad'[33] In *De Beers* v *Howe*[34] it was held that the business of the company was one business, 'namely, first to dig for diamonds in Africa, and then to secure the sale of them on the London market'—Per *Mathew L J* (affirmed by the House of Lords) In *Colquhoun* v *Brooks*[35] it was held that the residence in England of a sleeping partner of a firm whose activities were wholly in Australia did not result in the firm carrying on a part of the trade in the United Kingdom merely because the sleeping partner resided in England In *Denver Hotel* v

(32) 8 Tax Cases 193
(33) Per *M R Fisher—London Bank of Mexico* v *Apthorpe* 3 Tax Cases 143
(34) 5 Tax Cases 198
(35) 2 Tax Cases 490

Andrews[36] it was held that an English company which owned a hotel in the United States and had it run by a manager under the orders of the directors in England, carried on a single business the entire profits of which were taxable in England irrespective of their not having been remitted to England Somewhat similar cases are *Grove* v *Elliot* and *Parkinson*[37], *Frank Jones Brewing Company* v *Apthorpe*[38], *United States Brewing Company* v *Apthorpe*[39], *St Louis Breweries* v *Apthorpe*[40], *Apthorpe* v *Peter Schoenhofen Brewing Company*[41], and in all these cases the tendency was to emphasize the principle that it was wholly a question of fact where a trade was carried on

On the other hand, in *Kodak* v *Clark*,[42] an English company carrying on business in the United Kingdom acquired 98 per cent of the shares in an American company and thus obtained a predominant position in controlling the American company The remaining two per cent of the shares were held by independent persons The English company had no power—nor had it attempted—to exercise any control except as a dominating shareholder *Held*, that the foreign company was not carried on by, nor was it the agent of, the English company The profits of the American company were therefore not taxable except when brought to the United Kingdom Again, in *Gramophone and Typewriter* v *Stanley*[43] in which all the shares of a German company were held by an English company, and the Commissioners found that the English company controlled the German company, it was held that the possession of all the shares, in itself, was not enough for the purpose of holding that the business of the German company was the business of the English company

The pendulum however swung the other way again in *Ogilvie* v *Kitton*[44] in which the sole owner of a business in Canada resided in Aberdeen, and the business was carried on by paid managers in Canada who sent weekly reports, and the owner alone was entitled to the profits and liable for losses It was held in this case that the business was carried on in the United Kingdom

Per *Lord Stormonth Darling* —"It is a matter of power and right and not of actual exercise of a right or power Not a single instance

(36) 3 Tax Cases 356
(37) 3 Tax Cases 481
(38) 4 Tax Cases 6
(39) 4 Tax Cases 17
(40) 4 Tax Cases 111
(41) 4 Tax Cases 41
(42) 4 Tax Cases 549
(43) 5 Tax Cases 358
(44) 5 Tax Cases 338

has occurred in which he has as a matter of fact attempted to exercise this control or to give directions even about the smallest detail Yet the right of control is there all the time and it might be exercised any moment It is a matter, it seems to me of power and right and not of the actual exercise of the right or power "

This dictum, however, was qualified in *Egyptian Hotels* v *Mitchell*[45] In that case the Egyptian business of a company which owned hotels in Egypt, was carried on by a local board which met in Egypt The local board had all the powers necessary for carrying on the Egyptian business Only general meetings of the company held in Egypt could bind the local board or affect the Egyptian business The local board retained the profits in Egypt and remitted such sums to England as were necessary to pay dividends and expenses in the United Kingdom The London board kept the accounts and recommended dividends, which were declared by general meetings of shareholders in England The directors met only in the United Kingdom and lookd after the general control of the company including its general financial affairs The Commissioners found that the real control of the business was in England, and Horridge, J took the same view But the Court of Appeal held the contrary, and opinion being equally divided in the House of Lords, the decision of the Court of Appeal was confirmed Extracts are given below from the judgments of Lord Parker and Lord Sumner who agreed with the Court of Appeal —

Per *Lord Parker* —' The important point therefore was not whether he had power to interfere with the trade or business but whether he had so in fact interfered during the period for which the Crown alleged that he was assessable under Case I The trade or business we have to consider is a trade or business from which profits or gains can arise and not the trade or business of disposing of and dividing such profits and gains when they have arisen and I can see no reason why a corporation any less than an individual should not be engaged in more than one trade or business at the same time

It may well be possible that the board of directors of the company still retain powers by virtue of which they could if occasion arises so interfere with the company s business in Egypt that such business would cease to be carried on wholly outside this country but as I have already pointed out it is not what they have power to do but what they *have actually done* which is of importance for determining the question which now arises for decision '

Per *Lord Sumner* —' The question is whether the profits are wholly or partly earned from a business wholly or partly

(45) 6 Tax Cases 542

carried on in the United Kingdom If he takes a part at home in earning the profits, its importance relatively to that taken by his agents abroad does not matter, nor does the liability to be charged under Case I depend on active interference Control exercised here over business operations abroad, though they are far greater in volume or magnitude, will suffice for Case I[46] So too, will mere oversight regularly exercised, even though actual intervention never becomes necessary, everything abroad going smoothly without it[47] Some actual participation in carrying on the trade is necessary, though it may not go beyond passive oversight and tacit control It is not enough that the proprietor merely has the legal right to intervene, otherwise *Colquhoun v Brooks*[48] would have been otherwise decided for there the respondent was entitled to intervene at any time, though in fact he never did so, but took his share of the profits just as they happened to be earned by those in control abroad

I am of opinion that what the board of directors actually did fell short of taking any part in or exercising any control over the carrying on of the business in Egypt, and that where the directors forbore to exercise their powers the bare possession of those powers was not equivalent to taking part in or controlling the trading To say that part of a company's business is to pay dividends if it has earned them seems to me to be a play upon words "

English Company—Mines in Bolivia—Management delegated to Local Board—

An English company owned certain mines in Bolivia The management was delegated to a Local Board in Bolivia, the object evidently being to get the advantage of the decision of the House of Lords in the *Egyptian Hotel's case* An assessment was made on the Local Board in the name of a firm who were the agents in London of the company Later on, another assessment was made under Case I upon the company itself *Held*, by the House of Lords, that (1) the assessment upon the firm was bad and (2) the assessment on the company was good It was admitted that the company was resident in England, and it was found as a fact by the Commissioners that the trade was at all events partly carried on in England during the period of assessment The assessment on the company was therefore good The assessment on the firm was, however, bad because, in the first place, the Local Board in Bolivia had no separate corporate existence and were merely the agents in Bolivia of the English company, *also the agents in England were agents not of the Local* Board but of the principal of the Local Board, *viz*, the appellant company itself Besides, when the company itself had a residence

(46) *San Paulo (Brazilian) Railway Co v Carter*, (1896) A C 31, 5 Tax Cases 407

(47) *Ogilvie v Kitton* (1908) S C 1003, 5 Tax Cases 338

(48) 2 Tax Cases 490

in England, the Commissioners had no right to tax either the Bolivian Board or the agents of the company[49]

In *Noble* v *Mitchell*[49a], the French business of a company incorporated in England was managed by a Resident-Director in France, who derived his authority from a power of attorney from the Board of Directors in England He was not bound to attend the Board meetings in England but occasionally did so He also submitted reports at times to his colleagues The French profits were not remitted to England but included in the accounts there *Held*, that the control was exercised from England. The *Egyptian Hotels' case* was distinguished on the ground that in it the Egyptian Board derived powers from the Articles of the company while in this case the power was derived from a power of attorney from the English Board

Applicability of United Kingdom rulings—

As already observed these English cases cannot be applied in India without qualification But they can be followed to some extent in determining what constitutes the exercise of trade or carrying on business in British India If trade or business is carried on in British India there is little doubt that the profits from the trade accrue in British India itself, if the words 'accrue in British India' mean to be earned or derived from sources in British India Thus the principle of *Ogilvie* v *Kitton*[50] as modified by Lord Sumner in *Egyptian Hotels* v *Mitchell*[1] could be applied in cases of the type of *Ramanathan Chetty's*[2] having due regard to the circumstances of each case Similarly, there can be little doubt that the circumstances which would justify a foreigner being declared to 'carry on' or 'exercise' a trade in the country, will *a fortiori* justify his being declared to have a 'business connection' with the country (*see* section 42) These words 'business connection' really sweep aside Lord Herschell's distinction between trading *with* a country and trading *in* a country Even trading *with* a country involves a business *connection*

Accrue'—When a question of law—

The question whether income can be said to accrue or arise in British India would ordinarily be a question of fact but whether income accruing outside British India can be taxed as accruing in British India because the company is registered in British India is a question of law "[3]

(49) *Aramayo Francke Mines Ltd* v *Eccott* 4 A T C 261 9 Tax Cases 445
(49a) 11 Tax Cases 372
(50) 5 Tax Cases 338
(1) 6 Tax Cases 542
(2) 1 I T C 37
(3) Per *Macleod C J*, in In re *Aurangabad Mills*, 1 I T C 119

Railway Company working abroad—Receipts brought into British India—

The Pondicherry Railway Co constructed a railway line in French territory under an agreement with the French Government The South Indian Railway Co worked the Pondicherry Railway as though it were an integral part of its own undertaking The gross receipts of the whole system including the lines in French Territory were paid into a Government Treasury within British India The working expenses were allocated between the two systems in the same proportion as the gross earnings, the latter being shared on a certain arbitrary mileage basis The net profits were paid in rupees to the Pondicherry Company every half year subject to the sanction of the Secretary of State for India, and the Agent of the Pondicherry Company in India, who was the same person as the Agent of the South Indian Railway Co and had offices in the same building, remitted the money to London by Bank drafts

In view of the fact that the profits, though earned in French territory, were receivable in and actually paid in British India to the Pondicherry Company, it was held (*Coutts Trotter, C J*, dissenting) that the profits were liable to British Indian Income tax and taxable through their Agent in British India [3a]

Money-lender—Business abroad—Whether profit accrues in British India—

The assessee was the proprietor of a money lending business carried on on his behalf in various places in Indo China The business was carried on by agents appointed for fixed periods, who used their own discretion in lending money to customers The only part taken by the proprietor was to acquaint himself with the general state of the business and occasionally to issue general instructions The profits were not brought into India *Held*, that the profits were not liable as they did not accrue or arise in India

Per *Rahim Offg C J*— The tax is leviable with reference to the place where the income accrues or arises or is received and not with reference to the residence of the person who is entitled to the income This seems to be the entire scheme of the Act Whatever meaning be attached to the words accrue' or arise' or such as grows' or becomes due or payable it is impossible to hold that the income in this case could be said to have accrued or arisen in British India If loans are made and the borrowers reside outside British India and if accounts are adjusted the moneys lent are realised with profit or are capable of being realised and the profits are periodically ascertained and dealt with outside British India it is impossible to hold that the income of such business accrued or arose in British India A number of English decisions

(3a) 3 I T C 485

were discussed before us but it is unnecessary to deal with them in any detail, because the English Statute under consideration in those cases differs in many material respects from the Indian Act In the English Statute the place of residence of a person is a basis of assessment but is not so as pointed out above in Act VII of 1918 "

If the degree of control from headquarters had been greater, perhaps the Court might have been prepared to hold that the profits accrued or arose in British India See *Ogilvie* v. *Kitton*[4] and *Egyptian Hotels* v *Mitchell*

The following extract from paragraph 14 of the Income tax Manual should also be noted —

"A money lender resident in an Indian State who advances loans in an Indian State to persons residing in British India and who receives his interest in the State is not liable to pay income tax on the interest which he receives '

That is, it is neither earned nor received in British India, even though the interest may be met out of income arising from the exertions of the resident in British India

Company—Manufacture abroad—Whether profits accrue in British India—

A company with head office and control in British India had a press in an Indian State The press levied a charge on persons bringing material to be pressed, and this was received wholly at the factory The only receipt of money in British India was the remittance to the head office for expenditure The dividends of the company were payable only at the factory *Held*, that the income of the company did not arise, accrue nor was received in British India, nor could be deemed to accrue, arise or be received in British India within the meaning of section 3 (1) of the Income tax Act, 1918 (corresponding to section 4 (2) of the present Act)

Per *C J Obiter* — Even the small amounts received at the head office are not taxable '

Per *Coutts Trotter J* —' The same sum of money cannot be received *qua* income twice over once outside British India and once inside it "[6]

Accrue—Profits from manufacture outside British India—Control from British India—Not relevant—

The profits of a company which are derived from manufacture carried on beyond British India cannot be said to 'accrue' or 'arise' in British India on account of the head office being in British India[7] The doctrine of 'control' enunciated in various English decisions does not apply

(4) 5 Tax Cases 338
(5) 6 Tax Cases 542
(6) *Board of Revenue* v *Tipon Press and Sugar Mills*, 1 I T C 202
(7) In re *the Aurangabad Mills* 1 I T C 119

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Per *Rahim Offg C J*— The tax is leviable with reference to the place where the income accrues or arises or is received and not with reference to the residence of the person who is entitled to the income This seems to be the entire scheme of the Act Whatever meaning be attached to the words accrue' or arise or such as grows' or becomes due or payable it is impossible to hold that the income in this case could be said to have accrued or arisen in British India If loans are made and the borrowers reside outside British India and if accounts are adjusted the moneys lent are realised with profit or are capable of being realised and the profits are periodically ascertained and dealt with outside British India it is impossible to hold that the income of such business accrued or arose in British India A number of English decisions

(3a) 3 I T C 485

to profits from business accrued or arisen without British India to a resident in British India and subsequently received in British India (in this sub section), (2) in regard to profits arising or accruing to a non resident through or from any business connection or property in British India [section 42 (1)], (3) the deduction of super tax at source in certain cases (section 57), (4) professional fees earned in India by a person ordinarily resident in British India [section 11 (3)], and (5) refunds on account of 'small incomes relief' (section 48)

There is no definition of 'residence' in the Act or in the General Clauses Act In the circumstances, presumably the general principles underlying the English decisions, of which there are many, will apply to India also In England the question of residence is one of considerable importance because the taxation of residents rests on an altogether different basis from that of non residents

United Kingdom Law—

In England a 'resident' is taxed in respect of profits from trade carried on partly inside and partly outside the country, on the whole of the profits irrespective of where such profits accrue or arise, and in determining what constitutes the 'residence' of corporate bodies, the Courts brought in the question of control In India a resident can be taxed only in respect of income accruing, *or arising or received in British India, or what is deemed to* so accrue or arise or be received He cannot be taxed in respect of his whole profits wherever arising as in the United Kingdom

Remittance from abroad by non-resident—

While a resident is liable to be taxed on foreign profits brought into British India, to the extent specified in section 4 (2), a non resident is not liable to be taxed on foreign profits remitted to this country If a resident changed his residence temporarily out of British India he cannot evidently claim to be a non resident for *the purpose of this section The material date of residence* for the purpose of this sub section is the date on which the profits in question accrue or arise without British India, it is not necessary that there should be residence on the date on which the profits are brought into British India [11]

Residence—What is—

'Residence' signifies a man's abode or continuance in a place

"When there is nothing to show that it is used in a more extensive sense (it) *denotes the place where an individual eats drinks and sleeps* or where his family and servants eat drink and sleep [12]

(11) *Karuppiah Kangani v Commissioner of Income tax Madras* 3 I T C 282
(12) *Per* Bayley, J in *P v North Curry* 4 B & C 959

Press articles written by non-residents—

The mere publication in the press of this country of articles written abroad by a non resident—though written for the press in this country, and though the non resident may visit this country to get materials for the articles—will perhaps not make the income accrue or arise in British India, compare *Farrand* v *Mrs Satterthwaite*[8]

Manufacturers' agent abroad—When vocation exercised—

The appellant, a manufacturers' representative in the East, worked on a commission basis, paying his own expenses out of his pocket He had individual agreements with each manufacturer and visited the United Kingdom each year where he resided with his wife and children in a house belonging to his wife The family lived in England throughout The Commissioners held that the trade or vocation was carried on partly in the United Kingdom and partly abroad, and Rowlatt, J, declined to interfere[9]

(2) Profits and gains of a business accruing or arising without British India to a person resident in British India[10] [*shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received or brought*], notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they acrued or arose

Explanation —Profits or gains accruing or arising without British India shall not be deemed to be received or brought into British India within the meaning of this sub-section by reason only of the fact that they are taken into account in the balance-sheet prepared in British India

Resident—

The idea of 'residence' does not enter into the Indian Income tax law except in the following connections (1) in regard

(8) 8 A T C 85

(9) *Spiers* v *Mackinnon* 8 A T C 197

(10) These words were substituted for the words "shall be deemed to the profits and gains of the year in which they are received or brought into British India" by section 2 of Act XXVII of 1923, Gen Acts, Vol IX

to profits from business accrued or arisen without British India to a resident in British India and subsequently received in British India (in this sub section), (2) in regard to profits arising or accruing to a non resident through or from any business connection or property in British India [section 42 (1)], (3) the deduction of super tax at source in certain cases (section 57); (4) professional fees earned in India by a person ordinarily resident in British India [section 11 (3)], and (5) refunds on account of 'small incomes relief' (section 48)

There is no definition of 'residence' in the Act or in the General Clauses Act In the circumstances, presumably the general principles underlying the English decisions, of which there are many, will apply to India also In England the question of residence is one of considerable importance because the taxation of residents rests on an altogether different basis from that of non-residents

United Kingdom Law—

In England a 'resident' is taxed in respect of profits from trade carried on partly inside and partly outside the country, on the whole of the profits irrespective of where such profits accrue or arise, and in determining what constitutes the 'residence' of corporate bodies, the Courts brought in the question of control In India a resident can be taxed only in respect of income accruing, or arising or received in British India, or what is deemed to so accrue or arise or be received He cannot be taxed in respect of his whole profits wherever arising as in the United Kingdom

Remittance from abroad by non resident—

While a resident is liable to be taxed on foreign profits brought into British India, to the extent specified in section 4 (2), a non resident is not liable to be taxed on foreign profits remitted to this country If a resident changed his residence temporarily out of British India he cannot evidently claim to be a non resident for the purpose of this section The material date of residence for the purpose of this sub section is the date on which the profits in question accrue or arise without British India, it is not necessary that there should be residence on the date on which the profits are brought into British India [11]

Residence—What is—

'Residence' signifies a man's abode or continuance in a place

' When there is nothing to show that it is used in a more extensive sense (it) denotes the place where an individual eats drinks and sleeps or where his family and servants eat drink and sleep [12]

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(11) *Karuppiah Kangani v Commissioner of Income tax Madras* 3 I T C 282
(12) *Per* Bayley, J in *R v North Curry* 4 B & C 959

'But it is an ambiguous word "[13] But *qua* assessed taxes, a person resides not only where he sleeps but at his place of business

Per *Pollock, C B*—"The word 'reside' does not necessarily mean 'dwell' "

Per *Martin, B*— Strong ground for contending that one who spends the day at his shop attending to his business and may there be seen and conversed with on matters of business, and does not choose to be communicated with elsewhere, is 'residing' there '[14]

The words 'residence' and 'place of abode' are flexible and must be construed according to the object and intent of the particular legislation where they may be found[15]

Domicile has nothing to do with residence[16] A man can have two or more residences in two or more different countries but can have only one domicile[17] See also *Walcot* v *Botfields*[18] (a case of construction of a will) The domicile of an infant may be in a country to which he has never been physically 'Residence' connotes the idea of the person's bodily presence at some time or other In *In re Young*[19] a master mariner who was abroad for the greater part of the year was considered to be 'resident' because his wife and family resided in the United Kingdom in a house of which he was the tenant A similar decision was given in *Rogers* v *Inland Revenue*[20] and *Lloyd* v *Sulley*[21] (in the latter case the assessee resided mostly at Leghorn where he carried on business) In *Turnbull* v *Foster*[22] it was laid down that

' The test of liability is not having a residence in the United Kingdom it is residing in the United Kingdom "—Per *Lord Trayner*

If the person does not reside even for a day in the United Kingdom during the year of assessment, he is not a 'resident' for this purpose In *Inland Revenue* v *Cadwalader*[23] a foreigner who had a shooting in Scotland for a term of years and spent two months there every year was held to 'reside' in the United Kingdom

Per *the Lord President*—"A person may have more than one residence if he maintains an establishment at each of them "

(13) *Per* Cotton L J—In *re Bowie Exp Breull*, 16 Ch D 484
(14) *Attorney General* v *McLean* 1 H & C 750
(15) *R* v *Fermanagh Justices* (1897) 2 I R 563, *R* v *Tyrone Justices* (1901) 2 I R 510 (from Stroud)
(16) *Attorney General* v *Coote* (1817) 4 Price 183
(17) *Lloyd* v *Sulley* 2 Tax Cases 37
(18) (1854) Kay 534
(19) 1 Tax Cases 57
(20) 1 Tax Cases 225
(21) 2 Tax Cases 37
(22) 6 Tax Cases 206
(23) 5 Tax Cases 101

An establishment is not necessary in order to have a residence in a country Even a tramp must be resident in a country If a man chooses to live in hotels or even to stay with friends or relations it makes no difference[24]

In *Brown* v *Burt*[25] the assessee—an alien, who had lived for 20 years on board a yacht anchored near the shore in an English port—was held to 'reside' in the United Kingdom In *Thomson* v *Inland Revenue*[26] it was held that a person employed by an English company in Nigeria, who was the rated owner of a residence in England where his wife and family resided and who spent four months a year there 'resided' in the United Kingdom

Per *L J Clark* — 'I think in the sense of the Income tax Acts a man may reside in more than one place at the same time "

"When you are considering a question like residence you are considering just a bundle of facts"—*Per Rowlatt J* in *Loewenstein* v *De Salis*[27]

" must be a question of degree and of fact I suggest as a characteristic factor for consideration, even if it does not fulfil the nature of a test to ascertain if the suggested alternative place of residence is one which the subject seeks willingly and repeatedly in order to obtain rest or refreshment or recreation suitable to his choice when *for a time he is embedded in the enjoyment* of what he desired to attain and found in the abode of his own option Another factor may be found and an important one—if he returns to and seeks his own fatherland in order to enjoy a sojourn in proximity to his relatives and friends '—Per *M R Hanworth* in *Levene* v *Commissioners of Inland Revenue*[28]

See also *Karuppiah Kangani* v *Commissioner of Income tax Madras*[29] We entertain no doubt that he could properly be described as residing here he owned a house in the Ramnad District where his second wife and her children by him lived and he stayed in the house whenever he came to British India

Decisions under the English Acts, *e g*, Military Service Acts, *would evidently not* be applicable to income tax

Residence of companies—

Per *Lord Loreburn* in *De Beers* v *Howe*[30]

A company cannot eat or sleep but it can keep house and do business We ought therefore to see where it really keeps house and does business The decisions of Chief Baron Kelly and Baron Huddleston in the *Calcutta Jute Mills* v *Nicholson* and the *Cesena Sulphur Company* v *Nicholson*[31] now 30 years ago involved the principle that a company

(24) *Knight* v *Commissioners of Inland Revenue* 6 A T C 64 13 Tax Cases 80
(25) 5 Tax Cases 667
(26) 7 Tax Cases 137
(27) 10 Tax Cases 424
(28) 6 A T C 393 13 Tax Cases 486
(29) 3 I T C 282
(30) (1906) A C 455 5 Tax Cases 198
(31) (1876) L R 1 Ex D 428, 1 Tax Cases 83 and 88

resides for purposes of income tax where its real business is carried on. These decisions have been acted on ever since. I regard that as the true rule, and the real business is carried on where the central management or control actually abides."

A company, registered both in the United States of America and Ireland, purchased raw linen goods in Scotland and Ireland, arranged for manufacture by other firms and folded the finished goods themselves and sold them chiefly in the United States of America. The registered office of the company was in Belfast where general meetings were held, the minute book was kept, the accounts were audited and dividends were declared. But the sole director who had exclusive control resided in the United States of America. *Held*, that the company was resident in Ireland.[32]

In *New Zealand Shipping Company* v *Thew*[33] the company was incorporated in New Zealand with registered office there, with two boards of directors, one in London and the other in New Zealand. The London board had exclusive control over finance and administration and bigger questions of policy. The other board conducted the business in Australasia and negotiated independently of the London Board most of the freight contracts. General meetings were held and the share registers kept in both countries but the accounts were kept and the dividends declared in London. *Held*, that the Commissioners had sufficient evidence before them to arrive at the finding that the company was resident in London, and that where a company or a person resides is a question of fact.

An English company which was registered in the United Kingdom and carried on business there, promoted a company to own certain cotton mills in the U S A, the latter company being incorporated and registered in the U S A. No part of the output of the mills was sold in the United Kingdom. The entire stock of the American company was owned by the English company either directly or through trustees. Under the bye laws of the American company, there had to be seven directors of whom three had to reside in America. The current business of the company was to be directed by an executive committee of three directors resident in America and the regular meetings of the board were to be held in America, extraordinary meetings being held in the company's office in England. The more important powers could be exercised only by the extraordinary meetings of directors in England for example, the appointment of higher officials, the filling of casual vacancies among directors, entering into contracts

(32) *John Hood & Co* v *Magee* 7 Tax Cases 327
(33) 8 Tax Cases 208

for over one year, the appointment of directors, the borrowing of money, etc In practice, dividends also were declared in the extraordinary meetings in the United Kingdom *Held*, that there was sufficient evidence before the Commissioners to justify their finding that the American company was resident in the United Kingdom This decision reiterates the principle that residence is essentially a question of fact [34]

See also incidentally *San Paulo Railway* v *Carter*[35], *Apthorpe* v *Peter Schoenhofen, etc*[36], *Grove* v *Elliots and Parkinson*[37], and *St Louis Breweries* v *Apthorpe*[38]

The "head and brain" of a business cannot be a paid employee, or in the case of a company any one else than the Directors, however valuable might be the services of such employee or manager See per *Rowlatt, J*, in *Noble* v *Mitchell*[38a]

Company can have more than one residence—

The question whether a company could have more than one residence was definitely decided only recently There had, however, been *obiter dicta* to the effect that it can have two residences—*see* per Channel, J in *Georz* v *Bell*[39], *per* Phillimore, J in *D Beers* v *Howe*[40] (the House of Lords did not disapprove of this *obiter dictum*), per *Buckley, L J*, in *American Thread Company* v *Joyce*[41] The decision in *Mitchell* v *Egyptian Hotels, Limited*,[42] though it did not expressly decide this point, is, as pointed out by *Lord Cave* in *Swedish Railway Co* v *Thompson* (*infra*), inconsistent with the view that a company cannot have more than one residence A definite pronouncement was made on this question only recently in England in *Swedish Central Railway Company* v *Thompson*,[43] *infra*, and this decision was followed by the Madras High Court in *T S Firm* v *Commissioner of Income tax*[44] in which they held that the residence of a firm does not depend on the physical residence of the partners but on the place of control, and that a firm can have more than one residence simultaneously

(34) *American Thread Company* v *Joyce* 6 Tax Cases 1 and 163
(35) 3 Tax Cases 40
(36) 4 Tax Cases 41
(37) 3 Tax Cases 481
(38) 4 Tax Cases 111
(38a) 11 Tax Cases 37.
(39) (1904) 2 K B 136
(40) (1906) A C 455
(41) 6 Tax Cases 1
(42) (1915) A C 10 ; 6 Tax Cases 542
(43) 9 Tax Cases 342
(44) 50 Mad 84?, 2 I T C 320

It is submitted that the principle of these decisions will apply also to other associations of individuals and Hindu undivided families

A company owned a railway in Sweden, which was let to a company in Sweden The income of the former company whose registered offices were in London consisted only of the rent received for the railway The Secretary resided in London but the direction resided in Sweden The control was exercised in Sweden and only the formal administrative business was conducted in London by a Committee residing there *Held* (Lord Atkinson dissenting) by the House of Lords that a company which is controlled from abroad but which is registered in the United Kingdom can for the purpose of income tax reside both in the United Kingdom and abroad[45]

Per *Lord Chancellor Cave*—An individual may clearly have more than one residence[46] and on principle there appears to be no reason why a company should not be in the same position The central management and control of a company may be divided and it may keep house and do business in more than one place and if so it may have more than one residence (But) I am not prepared to say that registration in the United Kingdom would itself be sufficient proof of residence here that point does not arise in this case and I express no opinion on it But however that may be I am satisfied that the fact of registration together with the other circumstances which were found by the Commissioners to exist were sufficient to enable them to arrive at a finding

Per *Lord Buckmaster*—The reference to the registered office is important it is to my mind one of the critical facts in determination of residence in this country but not necessarily the sole and exclusive fact It varies in consequence in every instance Nor, even if it were the sole fact would it follow that a company incorporated and with a registered office elsewhere could not also be resident here for purposes of income tax

In *Egyptian Delta Land and Improvement Co* v *Todd*, 14 Tax Cases 119, the Lower Courts decided that a registered office in itself involved "residence", but the House of Lords did not accept this view

See the judgment of Lord Sumner The reasoning was as below

The Companies Acts say nothing about 'residence' Down to 1803 most tax payers were natural persons Throughout the United Kingdom Income tax Acts therefore the word 'resident' with its various qualifications actually' 'ordinarily', 'occasionally' 'temporarily', and so forth is used in a sense in every way appropriate to natural persons but only artificially applicable to incorporated persons and never really appropriate Indeed the words ' a person ordinarily resident in the United Kingdom is so inappropriate a term for a person though an artificial

(45) 9 Tax Cases 342
(46) *Cooper* v *Cadwalader*, (1904) 5 Tax Cases 101

one who is always and by law immovably resident in the United Kingdom that it cannot be sustained When the question of residence of companies under Income tax Acts first came before Courts they might well have left it to the Legislature to enact what residence of artificial persons meant but the Courts applied the word by analogy from natural persons In the case of the latter residence depends on *personal facts* Place of birth nationality and allegiance are not the tests nor is domicile What does matter is voluntary choice and habitual and repeated action—such as making a home keeping an establishment pursuing a settled object in a particular place Therefore there can be no real analogy between natural persons and artificial persons except that both must carry on business somewhere and it is really this that settles the residence of companies

Under the Companies Act no business need be done at its registered office and no profits or losses made there The obligation to have a registered office to keep registers for inspection etc is intended to help creditors and not to attract tax The latter is to be done by a Taxing Act and not by the Companies Act

In the *Swedish Railway case* it was unnecessary for the House of Lords to decide more than that a company could reside in two places The question is one of degree on facts That was really a case of divided control at the two places

You cannot have one test of residence for foreign companies *viz* place of control of business and another for local companies *i* place of incorporation *You must be consistent*

Scope of sub section—

This sub section does not apply to any income other than *profits and gains of a 'business'* *The sub section is necessary* because in its absence such profits would not be taxable Income cannot be received twice over by the same person as income once outside British India and again in British India The receipt on the second occasion must be presumed to be of capital and not *of income* See *Sundar Das Case*[47] and *Sir Ali Imam's Case*[48] cited *infra*

As regards this point as well as the fixing of the three years' limit *see* the following extract from the Income tax Manual

Section 4 (2) was inserted in the present Act owing to the tax having previously been evaded in the case of income accruing or arising out of British India and received in British India by bringing in the said income at intervals and claiming that as such income was not received in British India in the year in which it arose or accrued out of British India it was when brought *into British India not income but accumulated* profits or savings or capital The sub section is restricted in its application to the case of *business profits or gains* and provides with respect to

(47) 1 I T C 189
(48) 1 I T C 40*

such profits or gains that they shall be deemed to be profits and gains of the year in which they are received or brought into British India notwithstanding that they did not accrue or arise in that year provided that they are so received or brought in within three years of the end of the year in which they accrued or arose The provision relates of course merely to income profits or gains and not to the importation of capital it provides for the inclusion in the assessable income profits or gains of the year in which it was received or brought into British India of business profits or gains accruing or arising within the previous three years which would apart from the provisions of this sub section have been taxable had they been brought into British India in the year in which they arose or accrued

A person resident in British India carrying on and controlling business abroad is not therefore liable to tax on the profits of the business abroad unless and until such profits are received or brought by him into British India and when so brought or received he is only liable to tax on the profits of the last three years but the profits of those three years are included in his taxable income of the year of receipt (Income tax Manual para 15)

There was no corresponding provision in the earlier Acts but in *Narasammal v Secretary of State*[49] the Madras High Court held that annuities received through an agent in Mysore and then remitted to the assessee in British India were taxable under the Act of 1886 The *ratio decidendi* was that income' means 'what comes in'—a definition which will clearly embrace sums derived from a source like this and it is incontestable that in this case these sums were 'received in British India ' This view, however was abandoned in later cases *Board of Revenue v Ripon Mills*[50], *Sundar Das Case*[1], and *Sir Ali Imam s Case*[2] on the ground that money could not be *received* twice over by or on behalf of the same person as income and that the remittance or the second receipt should be considered to be receipt of capital In fact it was for this very reason that section 4 (2) of the present Act was introduced It may be possible, however to distinguish *Narasammal s Case* from the subsequent cases on the ground that in the former an agent received the money outside British India whereas in the latter the assessee himself received it But no such distinction is possible with *Sir Ali Imam's Case* as in that case the money was received by the assessee s Bank—as agent—in Hyderabad At the same time it is doubtful whether the suggested distinction is valid The agent's receipt outside British India constitutes a final discharge for the person paying the money, the act of receipt by the agent

(49) 1 I T C 10
(46 M 06 1 I T C 202
(1) 1 I T C 189
(2) 1 I T C 402

being considered in law to be a receipt by the principal, and what comes into British India is in performance of the duty of the agent to account to the principal Such a remittance is not 'income' Nor does the receipt accrue or arise in British India It is submitted therefore that the judgment in *Narasammal's Case*, which is not fully reasoned out, is not correct

Profits—Cannot be received twice over—

The assessee, a contractor during the war, received large sums of money from Government, but all the payments were made to him at Quetta in British Baluchistan which was then excepted from the operation of the Income tax Act except that part of the Act which imposed the tax upon salaries The assessee invested about 23 lakhs of rupees in the Punjab mainly in buying immoveable property The question was whether the sum so invested in the Punjab came within the purview of section 3, sub section (1) of the Income tax Act (VII of 1918) and was consequently liable to income tax *Held* that it did not so come and was therefore not taxable [Section 3 (1) of the Act of 1918 corresponds to present section 4 (1)][3]

Per *Shadilal C J* (Full Bench other Judges concurring) — It is not contended that the latter portion of this sub section has any application to the case before us and it is also admitted that the income in question accrued or arose not in the Punjab but in British Baluchistan which as already stated is exempted from the operation of the Act The matter then is reduced to this Was the income received in the Punjab? Now the statement of the case makes it absolutely clear that a very large sum of money was received by the assessee at Quetta and that a portion of it was afterwards invested in the Punjab Upon the material supplied to us we are not in a position to say whether the sum invested in the Punjab was actually brought into or transmitted to the Punjab whether it was paid to the vendors of the immoveable property by cheques drawn upon a bank in Baluchistan

Assuming however that the assessee after receiving the money in Baluchistan brought it into or transmitted it to the Punjab I do not think that the money thus brought or transmitted can be held to be income received in the Punjab The assessee undoubtedly received it in Baluchistan where he was not chargeable with the tax and I fail to understand how he can receive the same thing again when he has not parted with it in the interval Whether he brought the money with himself or transmitted it by a cheque or by any other method it remained all the time under his control and the process cannot be described as a second receipt of the money

The Act contains no definition of the word receive or received' but in Murray s Oxford Dictionary the expression receive is defined as to take in one s hand or into one s possession (something held out or

(3) Sundardas v Collector of Gujrat 1 I T C 189

offered by another) to take delivery of (a thing) from another either for oneself or for a third party ' In the Imperial Dictionary the same expression is defined as 'to get or obtain to take, as a thing offered given sent committed paid communicated or the like, to accept ' It seems to me that the word 'receive' implies two persons namely the person who receives and the person from whom he receives A person cannot receive a thing from himself "

The same principle, viz that money once received outside British India cannot be again received in British India by the same person unless such remittance can be deemed to accrue or arise in British India under sub section 4 (2) was followed in *Sir Ali Imam v Commissioner of Income tax, Bihar and Orissa*[4] In this case Sir Ali Imam received a gratuity on the termination of his services in the Hyderabad State The gratuity was paid to him voluntarily by the State The gratuity was paid into his account at the Imperial Bank of India at Hyderabad and afterwards remitted to him at Patna The Court had doubts as to whether the gratuity in question was a gratuity fee, perquisite, etc within the meaning of section 7 (1) rather than a casual non-recurring receipt not arising from a vocation, etc [section 4 (3) (vii)], but they decided the case on the other ground that assuming that it was a gratuity within the meaning of section 7 (1), it could not be deemed to have been received a second time in British India as sub section (2) of section 4 provides only for the *profits and gains of a business* and not for "salaries, etc " being deemed to arise or accrue in British India when brought into it

Remittance from abroad—Onus of proof, etc —

In respect of a remittance from abroad, it is for the assessee to prove that the remittance was capital and not income, and in the event of his failure to discharge this onus the presumption would apparently be that so long as the capital in the foreign branch is not depleted, all remittances are of profits (See *Schulze v Bensted* , *Scottish Provident Institution v Allan*[6] and *Muru gappa Chetty v Commissioner of Income tax*[7] It would largely be a question of fact in each case how the remittances should be apportioned as between Capital and Income Relevant evidence would be the accounts of the foreign branches or offices as well as the assessee's British Indian accounts, the flow of remittance transactions in either direction, the state of the capital accounts in the head office and the foreign branches, etc The much discussed doctrine of 'constructive receipt' would have to be applied in many such cases, *e g* , where the profits of the branch

(4) 1 I T C 402
(5) 8 Tax Cases 259
(6) 4 Tax Cases 591
(7) 2 I T C 139

are appropriated to meet a debt due from the head office But the theory of 'constructive receipt' cannot solve the problem of what is 'capital' and what is 'profits' All that it does, if the case admits of that doctrine being applied, is to enable 'profits'—which would otherwise escape—to be taxed It cannot enable the Income tax Officer to tax the remittance of what is clearly capital Thus if the foreign branch remitted, say, a large sum, for the cost of goods and the Indian office sent back the equivalent worth of goods, or, say, if the foreign branch borrowed money and remitted it to British India the remittance would in either case be normally but not necessarily (because the so called capital transactions may often be disguised remittances of profits) one of capital and not of profits Similarly the doctrine of 'constructive receipt' cannot ordinarily enable an assessee to set off the profits of one foreign branch against the loss of another foreign branch That is to say, there can be no 'constructive receipt' of a loss

In a case in which an assessee carrying on money lending business outside British India purchased land in British India in satisfaction of debts due to his foreign branch it was held that the constructive remittance involved was one of capital and not of profits except to the extent that interest on the loan for the last three years was included in the purchase price *S A S Subbiah Iyer v Commissioner of Income tax Madras* [7a] If the remittances into British India exceed those in the reverse direction, it is a reasonable presumption that profits have been brought into British India and it is for the assessee to rebut it as in the above case The mere non existence of debit entries in the foreign branch books and of corresponding credit entries in the books in British India is of little evidential value *Jasrup Baidyanath v Commissioner of Income tax Central Provinces* [7b]

The mere fact that the resident partners went on overdrawing on their accounts with the British Indian branch of the firm when there were no available profits in British India, does not (by itself) conclusively establish that the firm had received its foreign profits in the year in the cloak of remittances of capital or that the firm had distributed its profits to the partners *S L S Chettiappa Chettiyar v Commissioner of Income tax, Madras* [7c]

In assessing a person to tax, each year's transactions would have to be taken into account as a whole If the accounting year of the foreign branch does not coincide with that of the head office,

(7a) 58 M L J 581 at 602

(7b) Unreported

(7c) 4 I T C 188

the Income tax Officer can, if necessary, use his powers under section 13 and make the best that he can out of the accounts

The date on which a constructive remittance of profits made by adjusting book entries is made into British India will depend on the date of adjustment in British India rather than on the date of adjustment outside British India *S L S Chettiappa Chettiyar v C I T, Madras*[7d]

If a person has at his credit abroad profits which accrued within the last three years as well as profits which accrued before that period, and if he brings the profits into British India, it will be a question of fact in each case whether a particular remittance came from the profits of the last three years or the profits of the previous period In the absence of any evidence the presumption would be that the profits anterior to the three years had been capitalized and that what is being brought is income unless the assessee can prove that it is capital[8] The assessee cannot claim that in the absence of evidence to the contrary it should be assumed that the remittances were brought into British India in the order in which the profits were made outside British India —that is to say, each particular remittance would represent the oldest part of the unremitted profits at that particular moment *Clayton's Case*[9] which is sometimes quoted in support of this view is not a Revenue decision, and whatever may be the position as between a creditor and debtor or between a banker and customer, an assessee cannot claim an advantage merely by refusing to give information on a matter on which he alone can give the information In such a case the presumption is against the assessee and not in his favour The law casts upon him the burden of proving that the profits accrued or arose more than three years before, a matter, after all, peculiarly within his knowledge and not within that of the taxing authorities[10]

As already stated, it is a question of fact in each case whether a particular remittance relates to capital or relates to profits more than three years old It follows, therefore, that an assessee cannot escape taxation merely by debiting the remittance to capital when in fact the remittance does not relate to capital A mere method of accounting cannot be used in order to defeat the revenue—see notes under section 13

It is the actual amount brought into British India that is liable to tax No set off can be claimed on account of losses

(7d) 4 I T C 188

(8) *A S P I V R Ramaswami Chettiar and others v C I T, Madras* 3 I T C 425

(9) 35 Ch 781

(10) *S K P S L v Commissioner of Income tax*, 50 Mad 853, *S A S Subbiah Iyer v C I T, Madras*

incurred more than three years before There is no provision in the Act requiring the taking of accounts of the years preceding the previous year, and the profits of the previous year do not cease to be such merely because there were losses in the preceding years[11 13] If however the assessee can prove that he has withdrawn his capital from abroad, set off might indirectly be allowed

Assuming that each year's profits can be identified in the remittances, it is not necessary, in order to claim the allowances under section 10, that *all* the profits of the three years should first be brought into British India See *Harikishenlal* v *C I T., Punjab*

If a resident in British India is a partner in a firm outside British India and makes advances of money to the firm, being genuine loans bearing interest, and takes periodical credit for the interest through his account in the firm as a partner, there can be no doubt that there is a constructive remittance of the interest from outside British India into British India, and the interest therefore would be taxable in the hands of the resident in the year in which he takes credit for the interest

The presumption ordinarily is that a branch office does not make a 'loan' to its head office or *vice versa* The relation of creditor and debtor cannot exist between a head office and a branch It follows therefore that the remittance of so called interest on such loans would be treated as remittance of profits See however *Somasundaram Chetti's Case*[14]

It is similarly a reasonable presumption that a man's private expenditure is in the absence of evidence to the contrary met out of income and not out of capital Where, therefore, the accounts do not show clearly that a remittance is capital but the assessee uses such remittance for his private expenses, the assessee can be put to proving that the remittance is not income but capital

Where an assessee takes over a money lending business abroad and remits monies to British India, the fact that certain sums represent interest accrued before the business was taken over and are therefore capital must be proved Mere entries in the books are not conclusive Similarly the fact that the sums represent capital lent out and returned must be proved by the assessee If the profits realised abroad are in excess of the amounts brought into British India, the taxing authorities may assume in the absence of evidence to the contrary (which it is for

(11 13) A S P L R Ramasuami Chetti and others v Commissioner of Income tax, Madras 3 I T C [illegible]

(14) [illegible] I T C 61

the assessee to adduce) that the remittances are all out of profits[15]

In a case in which there was a continuous running account between the Madras branch of the business and that in Malaya, and there was an entry in the Madras books which had the effect of cancelling the indebtedness of the resident partner to the Madras branch on account of his personal drawings, the Commissioner assumed that there was an appropriation of profits remitted from abroad, and the assessee did not disprove this assumption The High Court held that the Commissioner had legal evidence to support his finding[16]

If the assessee hands over outside British India his foreign profits to a charity and the latter brings the money into British India though through the assessee, the remittance is not taxable because it is the property of the charity Whether the profits were in fact handed over (outside British India) to the charity is a question of fact[1]

The three years' limit is of course to be strictly applied The fact that meantime the profits have been 'capitalised' in the accounts of the assessee does not affect his liability to tax Nor, on the other hand, will his liability continue beyond three years even if his profits have *not* been 'capitalised' by him

Explanation—This explanation was introduced at the instance of the Legislative Assembly in 1922 It is really otiose and embodies a well known doctrine laid down in several decisions of which the most important is *Gresham Life Assurance Society* v *Bishop*,[1] [18] decided by the House of Lords—cited *infra* The first decision in India to enunciate the doctrine was In re *Aurangabad Mills*[19]

Remittance—Question of fact—

Whether profits earned abroad have been brought into the country or not is as already observed a question of fact All that the explanation does is to prevent foreign profits being taxed merely on the strength of the foreign profits being incorporated in the accounts kept in British India In the *Nedungadi Bank* v *Commissioner of Income tax, Madras*,[20] [22] in which there was no separate account to show the profit or loss in the foreign branches and all the profits and expenses were transferred from the foreign branches to the British Indian Head Office by regular entries in the books and the remittances from the foreign branches exceeded the

(15) *P L S K L v C I T Madras* 4 I T C 18
(16) *K [illegible] L [illegible] malai Chetti v Commissioner of In[illegible]* [illegible] I T C 156
(17 18) 4 Tax Cases 464
(19) 1 I T C 119
(20 22) 49 Mad 910

remittances to the foreign branches, it was held by the Madras High Court that the amounts earned as profits in the foreign branches were transmitted to British India The question was one of fact and the High Court did not interfere as it was not shown that there was no evidence to support the finding of the Commissioner

Though Chetti firms usually make paper adjustments of interest as between branches with the sole object of adjusting the commission payable to local agents, and not of reflecting actual loans made or interest received, it was held in *Somasundaram Chetti* v *Commissioner of Income-tax*[23] that, if on evidence the Commissioner found that interest was actually paid by one branch to another, the finding was one of fact in which the High Court could not interfere

Income from abroad—Foreign taxes paid thereon—

Though what is taxed under this sub section is the actual amount of profits brought into British India, it may sometimes be necessary to compute the profits from the business abroad with reference to the provisions of section 10, in order to determine the allocation of the amount brought into British India between capital and income or between income of the last three years and income of preceding years

If the income in question is received in British India after it has paid a foreign income tax, the income for the purpose of Indian income tax should be the gross income including the foreign tax, *see* proviso to section 10 (2) (ix) In those cases in which the income is entitled to Double Income tax Relief under section 49, the income is computed exactly as it would be for the purpose of Indian income tax if there were no question of Double Income tax Relief, and where a share of the income is assessed under Rule 33, the share taken is of the 'gross' income of the assessee including foreign taxes [24] The practice in the United Kingdom, however, in respect of income not receiving Double Income tax Relief is to allow foreign taxes as a business expense

Place of receipt—

The place where income is received is a question of fact and not a matter to be determined with reference to intention In *Sir Syed Ali Imam* v *The Crown*[25] the Finance Member of the Nizam's Government asked the Agent of the Hyderabad Branch of the Imperial Bank of India to arrange to pay a sum of money to Sir Ali Imam through the Patna Branch of the Bank and take a formal receipt from him The Hyderabad Agent wrote to the

(23) 2 I T C 61

(24) See *Chief Revenue Authority* v *Eastern Australasian Telegraph Co*, 1 I T C 120

(25) 1 I T C 402

Patna Agent, enclosing duplicate receipts to be signed by Sir Ali Imam and asking him to pay the amount to Sir Ali Imam and return the receipts signed in duplicate Sir Ali Imam returned the receipts duly signed but asked the Patna Agent to instruct the Hyderabad Branch to place the money to Sir Ali Imam's credit at the Hyderabad Branch until further instructions There was no book-entry in the Patna Branch crediting Sir Ali Imam and debiting the Hyderabad Branch About a fortnight later Sir Ali Imam asked the Hyderabad Branch to transfer the balance at his credit to the Patna Branch It was argued by the Commissioner that (1) the instructions of the Finance Member of the Hyderabad State to arrange for payment through the Patna Branch showed the intention of the employer, (2) the assessee's acknowledgment being signed at Patna constituted a receipt in British India; and (3) the instructions given by Sir Ali Imam to the Patna Branch were really to transfer the amount back to Hyderabad None of these contentions was upheld by the High Court The intention of the employer is irrelevant and it is a question of fact where and when a sum of money is received Though the written acknowledgment of receipt is undoubtedly evidence of the fact that the money has been received it is not always conclusive Such receipts are frequently demanded before actual payment of the money, and in the present case nothing had been credited to Sir Ali Imam in the books of the Patna Branch until, in accordance with Sir Ali Imam's subsequent instructions a fortnight later, the balance at Hyderabad had been transferred to Patna The third contention also was wrong inasmuch as there was nothing at Patna to be transferred to Hyderabad, the Patna Branch not having credited Sir Ali Imam with anything in the first instance

The Amir of Bokhara entrusted the assessee, a trader of that place, and two servants of his own, with valuable furs, for sale in Europe After selling these for 16 lakhs of rupees and depositing the money in a Bank in England, the assessee returned to India, and found that Bokhara was under the Bolsheviks and the Amir a refugee in Kabul The assessee settled down in Peshawar permanently The Amir sued the assessee and the two servants in the Peshawar Civil Court for the sale proceeds of the furs, and by a compromise decree the assessee was given two lakhs of rupees as commission The assessee claimed that the money had already been received in England and deposited in the Bank there, and that the receipt of two lakhs as commission was a second receipt of the same sum and therefore not taxable Held, that in the absence of any authority given to him to appropriate a part of the sale proceeds towards his commission he was not the owner but the trustee of the money until the compromise decree, and that

the two lakhs was therefore received by him for the first time after the decree and therefore taxable under section 4 (2) [26]

Agricultural operations abroad—Profits from—

The *Killing Valley case* did not decide that agriculture was not a business all that it decided was that income from growing tea is 'agricultural income' On the other hand there are authorities to hold that operations analogous to growing tea constitute a trade or business. In *Back v Daniels* Scrutton, L J, says "Cultivating land to grow produce for the purpose of sale is in my opinion a trade" In *I R Commissioners v Ransom,* Sankey, J described husbandry as a business Again, in the *Vallambrosa case* Lord Johnstone refers to the cultivation and production of rubber as the trade, manufacture, adventure or concern of the company The profits from growing tea are, therefore, profits of a business within the meaning of section 4 (2) Accordingly, the entire profits including the profits from agricultural operations from a tea garden outside British India are liable to tax when brought into British India In this case leave to appeal to the Privy Council was refused [27]

Remittance—From abroad—Constructive—

"The money received by the agents in America remains in their hands and it remains in their hands for investment there But then an equivalent for the amount of that interest is retained by the managers in this country out of money borrowed by them on debenture for the purpose of being sent out to America and invested upon foreign securities there so that the one sum is just set against the other in the books of the company and it is for the Court to determine whether that *species facti* does not sufficiently satisfy the words of the rule that the interest upon the foreign securities has been received in this country According to the way in which this company keeps its books it has really converted a sum which was received in this country as capital into an equivalent for the interest upon the foreign securities They have received it (the interest) in the most proper sense of the term that it enters their books in this country as such interest and is paid away as such" [28]

A Scottish Life Assurance Society lent out sums of money in Australia on interest The interest accruing was not remitted to the United Kingdom *in forma specifica* but retained abroad and invested or used to cover the expenses of the Australian branch office It was, however, entered in the revenue ac

(26) *Board of Revenue v Ripon Mills* 1 I T C 202 *Sundardas v Collector of Gujrat* 1 I T C 189 and *Sir Ali Imam v Commissioner of Income tax* 1 I T C 402 distinguished *Tara C 1 Bos v Commissioner of Income tax* 8 Lah 335

(27) *P M S T Ponnuswamy Pillai v Commissioner of Income tax M* 3 I T C 378

(28) Per the Lord President in *Scottish Mortgage Company v McKel* Cases 165

count of the Society is received *Held*, that interest not received in the United Kingdom was not assessable to income tax, and that the facts in these cases did not amount to 'constructive remittance'[29]

An English Fire Insurance Company doing business in America received there as part of its profits interest on American securities The interest was brought to account in the books of the company in England as profit, but it was not remitted to England being invested in America in American securities in order to build up a reserve as required by the laws of the United States *Held* that the interest formed part of the profit of the company assessable under Case I of Schedule D and also that the interest was in effect received in England

Per *Wright J* — If there is a trade which cannot be carried on without making investments abroad the interest arising on the investments necessarily made for the purpose of the trade is it seems to me part of the gains of the trade (Also) in effect it seems to me that the £5 000 is received in this country because this money would have to be sent out from here if it were not otherwise provided [30]

(The second part of the decision must be taken as overruled by the *Gresham Society Case infra*)

An English Assurance Society with branches in India received there certain interest from securities in India and the colonies This interest was applied in India towards the payment of the various obligations of the Society arising for settlement in India *inter alia* its obligations under policies, and it was not remitted to England *in forma specifica* It was however, treated *Held* that the interest was constructively remitted to England

Per *Kennedy J* — I think that the facts stated show that this Indian interest was not merely entered in the accounts of the Society which by itself would be a matter of little consequence but was retained in India merely as a matter of commercial convenience and that but for such retention an equal sum must have been remitted to India to discharge the Society's liabilities there and that in reality the amount of this Indian interest was treated by the Society as part of the divisible property upon which dividends had been declared and paid in the United Kingdom In these circumstances it appears to me that there is a constructive remittance according to the law as applied in *Scottish Mortgage Company v McKelvie*[31] and in the *Norwich Union Fire Insurance Company v Magee*[30] *Forbes v Scottish Widow's Fund etc* and *For*

(29) *Scottish Mortgage Company v McKelvie* 2 Tax Cases 16 distinguished *Forbes v Scottish Widows Fund and Life Assurance Society* 3 Tax Cases 443
(30) *Norwich Union Fire Insurance Company v Magee* 3 Tax Cases 457
(31) 2 Tax Cases 16

bes v *The Scottish Provident Institution*[32] appear to me to be distinguishable. In neither case was the interest received abroad treated as forming part of the divisible profits. It was simply retained and used abroad for purposes of loan and investment.[33]

This case was overruled by the House of Lords in *Gresham Life Insurance Society* v *Bishop*—post.[34]

A Life Insurance Company established in the United Kingdom carried on business outside. The business was managed by directors abroad who had power of accepting risks, but all investments abroad had to be sanctioned at the head office. Remittances *in forma specifica* of interest received abroad were not made, and remittances out of the receipts abroad of interest and premiums were made only as required by the general policy of the company. At a quinquennial valuation, and in the yearly statement of accounts, the whole of the receipts abroad, including the interest on investments abroad were brought into account in the division of the profits of the company. *Held* that the interest received abroad and invested or applied abroad was not 'received' in the United Kingdom within the meaning of Case IV of Schedule D.[35]

A Life Insurance Company established in England carried on business abroad, and re-invested abroad moneys, including interest, received abroad. The interest received abroad was not remitted to England, but included in the company's yearly statement of accounts and in the triennial valuation, on which the profits of the company were estimated. *Held,* that interest so received abroad and applied or re-invested abroad was not "received" in the United Kingdom within the meaning of Case IV of Schedule D.

This is the leading case on the point which overrules some of the previous decisions, and the following extracts from the speeches in the House of Lords will show that while the House was unanimous as to the particular case they were not altogether agreed as to the circumstances in which a 'constructive' remittance might be presumed. That the actual passage of money from hand to hand is not a necessary condition of payment or receipt is not only in accordance with commercial practice but has received recognition in two Privy Council decisions.[36] Neither case however was under income tax law.

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(32) 3 Tax Cases 443

(33) *Universal Life Assurance Society* v *Bishop* 68 L J Q B 962 4 Tax Cases 139

(34) 4 Tax Cases 464

(35) *Scottish Mortgage Company of New Mexico* v *McKelvie* 2 Tax Cases 165, distinguished (Lord Young dissenting) *Standard Life Assurance Company* v *Allan* 4 Tax Cases 446

(36) *North Sydney Investment and Tramway Company* v *Higgins* (1899) A C 263 *Larocque* v *Beauchemin* (1897) A C 358 (a case from Quebec)

Per *Lord Chancellor Halsbury* —" Now, here the money has not actually been received in this country It is to be observed that the Legislature has assumed by the distinction which it has made between the mode of ascertaining the amount payable generally upon the balance of gains and profits and the amount taxable in respect of the interest payable upon foreign investments that it had earmarked that sum and made it subject *to distinct and peculiar incidents The difficulty of* identifying the actual sum is no limit on the enactment The Legislature must be supposed to have contemplated the possibility of drawing a distinction between money received in this country and money accounted for or credited in account If it were not for the difficulty of ear marking money I should think no one would have any doubt that the money must be received in this country to bring it within the words of the statute If it were not money but some commodity say tobacco which a trader carrying on business in London and Paris was accounting for to his London house no one would say that though the Paris tobacco was credited in account as a set off against some expense or something that the supposed London firm had to set off against the same claim and that as the London firm was paid by the Paris tobacco therefore the tobacco was liable to the import duty on tobacco because it was taken into account in the books of the London firm

In no way that I can give any reasonable interpretation to has the money reached this country or been received in this country It like the tobacco in the case suggested has not been imported and if the Legislature had intended that bringing it into account was to be equivalent *to* its being received it would have been easy to say so It cannot be said that the use of artificial meaning to be attached to ordinary language is either unknown or unusual in legislation and if it was intended to make this a special subject of taxation to be taxed whenever and wherever an equivalent amount was credited or booked or in any other way recognised as having come under the dominion of the owner in this country nothing could have been easier than to enact it in plain terms

I decline to go beyond the words used and I do not think this money was received in this country

I do not think any amount of book keeping or treatment of these assets wherever they may be will be equivalent to or the same thing as receiving the amount in this country

Per *Lord Macnaghten* — I do not understand what is meant by constructive receipt in such a case as this or how any sums can be said to have been received in the United Kingdom unless they have been brought to the United Kingdom or unless there has been a remittance *"payable in the United Kingdom" to borrow the language of the rule* applicable to the fifth case The circumstances that the business of the Society is "one indivisible business" and that the Society in the statement of its affairs and in its dealing with its shareholders and customers takes into consideration its foreign assets and liabilities seems to me to be immaterial to the present question As my noble and learned *friend*

Lord Robertson when Lord President observed in the case of the *Provident Scottish Institution*[37] Every man and every company having foreign or colonial investments of course knows of the interest arising from them takes note of it and enters it in any statement of affairs which may require to be made up ' But that as I think and as the Lord President thought is a very different thing from bringing the interest home a very different thing from the receipt of the money here either in specie or as represented by a remittance payable in this country

The difficulty seems to have arisen from a misunderstanding or a misapplication of the judgment in the *New Mexican* case That was a very special case Whether the decision was right or wrong it can have no bearing upon the question now before your Lordships Speaking for myself I think the decision was right In that case as it seems to me in the transmission to this country of money which the company was free to distribute and the transmission to America by way of exchange of an equivalent amount which the company was bound to re invest the company acted as their own bankers and did for themselves by an entry in their books what might have been done less conveniently and less economically by an ordinary bank or financial agent on their behalf

Per *Lord Shand* — As they left that interest where it was gained it was never received in this country When it was entered in the company s balance sheet in order to enable the ascertainment of the profits of the year it was so entered as estate which had not been received in England but as property belonging to the company which they acquired abroad which had not been brought home or received here but which was part of their foreign assets Money or securities in that position was properly taken into account in the ascertainment of the year s profits not because it had been received in England but because although not so received it was part of assets of value which the company had acquired and held abroad In the Scottish case of the *Investment Company of New Mexico*[38] the *species facti* was different for there the company treated the money as received in this country and merely saved themselves the expense of cross remittances

Per *Lord Brampton* — But it was argued that if not actually it was constructively so received in the accounts of the Society I confess I do not like that expression nor do I quite understand what it means If a constructive receipt is the same thing as an actual receipt I see no reason for the use of the word constructive at all If it means something differing from or short of an actual receipt then it seems to me that a constructive receipt is not recognised by the Statute which in using the word received alone must be taken to have used it having regard to its ordinary acceptation

The Master of the Rolls (Sir A L Smith) in his judgment in the Court of Appeal while stating that there must be an actual receipt of the amount added but that receipt need not be in specie it may be

(37) 3 Tax Cases 443
(38) ? Tax Cases 165

in account" and he then proceeded to deal with the accounts of the appellants set forth in the Appendix and to draw from them the inference that the appellants had actually received and dealt with these foreign dividends in the United Kingdom and had distributed them as having been so received Now I am not prepared to deny that accounts may be so worded as to contain admissions justifying such an inference but I differ with the view he took that such admissions or anything approaching them are to be found in the accounts before your Lordships

For the Crown the case of the *Scottish Mortgage Company of New Mexico v Commissioners of Inland Revenue*[39] was much relied upon I am not satisfied with the correctness of the judgment in that case but assuming it to be sound it is distinguishable from the present case

Per *Lord Lindley* — I agree with the Court of Appeal that a sum of money may be received in more ways than one *e g* by the *transfer of a coin or a negotiable instrument or other document which* represents and produces coin and is treated as such by businessmen Even a settlement in account may be equivalent to a receipt of a sum of money although no money may pass and I am not myself prepared to say that what amongst businessmen is equivalent to a receipt of a sum of money is not a receipt within the meaning of the Statute which your Lordships have to interpret But to constitute a receipt of anything there must be a person to receive and a person from whom he receives and something received by the former from the latter and in this case that something must be a sum of money A mere entry in an account which does not represent such a transaction does not prove any receipt whatever else it may be worth Has that sum been received in this country by the Gresham Company? The special case clearly shows that it has not in fact been remitted to this country in any way whatever Applying the test already suggested no one here has received that sum the agents who received it abroad still have it abroad or have dealt with it otherwise than by sending it to the company here No account even is forthcoming to show that the sum has ever been treated as remitted here so as to justify the inference that in any commercial sense the sum has been received in the United Kingdom as distinguished from other countries

What has been done and all that has been done is that the Gresham Company in making up its accounts with a view to ascertain what profits it could divide in a particular year entered on its asset side the sum of £143,483 as money received during the year But when required to pay duty on the item of £143,483 on the ground that this sum is made up of interest or dividend received in the United Kingdom the company objects on the ground that it represents nothing of the sort Nor does it in truth

The fact that the profits shown by the account have been divided amongst the shareholders of the company does not carry the case any further *No part of the £143,483 has come over here or been in any sense* received here and then applied in payment of dividend thinking

(39) 2 Tax Cases 165

as I do that *McKelvie's case* may be properly upheld I am not prepared to adopt it as a new starting point for further inferences The language of the Statute is the true starting point on each case *Forbes case* and the *Standard Life Assurance Company's case* were both based on this sound principle and were in my opinion both clearly rightly decided The Court of Appeal in my opinion considered this case undistinguishable from *McKelvie's* but I am unable so to regard it Assuming them to be undistinguishable it would in my opinion be more correct to overrule *McKelvie's case* than to decide the present appeal in favour of the Crown [40]

Remittance—Capital or income—Question of fact—Onus of proof—

A Life Insurance Society invested funds in Australia The interest realised was retained and reinvested In the accounts of the Australian branch capital and interest accounts were mixed together and occasional remittances were made to the head office *Held* by the House of Lords that the remittances were of interest and not of capital and that it was a question of fact whether the remittances were the one or the other

Per *Lord Shand*— The question is as your Lordship has put it entirely one of fact The amount of money which was sent out by the company as capital remains in Australia It has been gradually increased and not diminished and that amount of money still remains there

The moneys that have come home were therefore in the nature of interest and I do not think that the mere circumstance of there being such letters as are here founded upon is making them out to be capital though they are really interest can have that effect

Per *Lord Halsbury*— It is for the company to show if the fact be so that the remittance ought to be subject to a certain amount of deduction because a good deal of it was repayment of capital [41]

Foreign securities—Income from—Reinvested abroad—

A part of the Revenue of a Life Assurance Society which carried on business in the United Kingdom only, consisted of interest on foreign Bearer Bonds and other foreign Securities The Securities were kept at the Head Office and the interest included in its revenue account As the interest fell due the coupons etc, were sent from the Head Office to the Society's agents abroad who received the interest and invested it abroad as directed by the Head Office, in foreign Bearer Bonds and other foreign Securities and these in their turn were sent to the United Kingdom *Held* that the interest was not received in the United Kingdom within the meaning of the 4th Case of Schedule D and was therefore not liable to assessment to income tax

(40) *Gresham Life Society* v *Bishop* 4 Tax Cases 464
(41) *Scottish Provident Institution* v *Allan* 4 Tax Cases 591

Per the Lord President—Now actual receipt of money it seems *to me can only be effected in one of two ways Either the money itself must be brought over in specie or the money must be sent in the form which according to the ordinary usages of commerce is one of the known forms of remittance*

As far as the bond itself is concerned it is of course a piece of paper but it represents a debt

According *to the argument of the Crown the money* was received in this country the moment the bond came into the company's safe in London or in Edinburgh Equally it was in America because the day of payment had not yet come and therefore it was so to speak in the pocket of the debtor How it can be at one time both in America and in this country is I think a difficulty which surpasses even the powers of legal fiction [42]

Foreign Securities—*Income from—Reinvested abroad and sent home and sold—*

A company possessed securities in America The interest received on them was reinvested in bearer bonds and these bonds were sent to the company's head office in Scotland Soon after their receipt at the head office the bonds were sold *Held* that the proceeds of the sale of the bonds were taxable

Per the Lord President—Now the argument for the Crown is that this has been received in Great Britain in the year of assessment and therefore must be charged The argument for the institution is that inasmuch as it was not earned in the year it does not fall within the Income tax Act at all

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When a profit or an interest is earned in this country the question really cannot arise because the profit which is earned in this country is *necessarily received in this country I use the word received'* because you may quite well have a profit which has not been paid to you in hard cash In many and many a partnership it does not pay its profits in hard cash or a partner does not take his profits in cash but nevertheless it is earned and being earned it is necessarily received by the partner at the time it is earned But when the profit is earned abroad it is not necessarily received at the same time in this country It is of course received in the sense of your having a right to it there but it is not received in this country and accordingly this fourth Case has said that the duty was only to be computed on sums which have been or will be received in the current year As soon as they are received I think they become chargeable [43]

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(42) *The Scottish Widows Fund Life Assurance Society* v *Farmer* 5 Tax Cases 508

(43) *The Scottish Provident Institution* v *Farmer* 6 Tax Cases 38 39

Remittance from abroad—Capital or income—Onus of proof—

The appellant had received certain income from Trieste which was assessed to tax He did not furnish the information required by the Commissioners but contended (1) that under the banking system in Trieste all sums deposited bore interest from the date of lodgment and therefore the remittance was of capital and not of income, (2) that the remittance was a loan to him from a trust of which he was trustee The Commissioners found as facts that the account in the Trieste Bank was an omnibus account that stood in the assessee's name as an individual and that as he had not attempted to discharge the onus that lay on him of distinguishing which part of the income was capital, the remittances must be presumed to be his income *Held*, that as the appellant had not disclosed the necessary information, the evidence before the Commissioners was sufficient to support the conclusions of fact at which they had arrived [44]

See also the case of *A V P M R M Murugappa Chettiar*,[45] in which it was held, following *Scottish Provident Institution* v *Allan*,[46] that the presumption was that remittances were of profits and that it was for the assessee to rebut the presumption

Debtor abroad—Interest received from—Not brought into British India—Accruing in British India when—

See *Commissioner of Income tax, Madras* v *Subramanian Chettiar*[47] and *S V L L Lakshmanan Chettiar* v *Commissioner of Income tax, Madras*,[47a] as to the circumstances in which interest due from creditors abroad and not actually brought into British India but credited in the accounts of the assessee creditor in British India may be taxed on the footing that such income accrues in British India within the meaning of section 4 (1)

(3) This Act shall not apply to the following classes of income —

General—

The exemptions in this sub section remove liability for both super tax and income tax The income under these heads cannot be taken into account under 'total income' under section 16 In other words the income has to be completely ignored for *all* purposes under this Act Even if the income should fall under one of the heads described in section 6, it would neverthe-

(44) *Schulze v Bensted* 8 Tax Cases 259
(45) 49 Mad 465, 2 I T C 139
(46) 4 Tax Cases 591
(47) 50 Mad 765
(47a) 3 I T C. 421

Per the Lord President—Now actual receipt of money it seems to me can only be effected in one of two ways Either the money itself must be brought over in specie or the money must be sent in the form which according to the ordinary usages of commerce is one of the known forms of remittance

As far as the bond itself is concerned it is of course a piece of paper but it represents a debt

According to the argument of the Crown the money was received in this country the moment the bond came into the company's safe in London or in Edinburgh Equally it was in America because the day of payment had not yet come and therefore it was so to speak in the pocket of the debtor How it can be at one time both in America *and in this country is I think a difficulty which surpasses even the* powers of legal fiction [42]

Foreign Securities—Income from—Reinvested abroad and sent home and sold—

A company possessed securities in America The interest received on them was reinvested in bearer bonds and these bonds were sent to the company's head office in Scotland Soon after their receipt at the head office the bonds were sold *Held* that the proceeds of the sale of the bonds were taxable

Per the Lord President—Now the argument for the Crown is that this has been received in Great Britain in the year of assessment and therefore must be charged The argument for the institution is that inasmuch as it was not earned in the year it does not fall within the Income tax Act at all

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When a profit or an interest is earned in this country the question really cannot arise because the profit which is earned in this country is necessarily received in this country I use the word received' because you may quite well have a profit which has not been paid to you in hard cash In many and many a partnership it does not pay its profits in hard cash or a partner does not take his profits in cash but nevertheless it is earned and being earned it is necessarily received by the partner at the time it is earned But when the profit is earned abroad it is not necessarily received at the same time in this country It is of course received in the sense of your having a right to it there but it is not received in this country and accordingly this fourth Case has said that the duty was only to be computed on sums which have been or will be received in the current year As soon as they are received I think they become chargeable [43]

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(42) *The Scottish Widows Fund Life Assurance Society v Farmer* 5 Tax Cases 508

(43) *The Scottish Provident Institution v Farmer* 6 Tax Cases 38 39

Remittance from abroad—Capital or income—Onus of proof—

The appellant had received certain income from Trieste which was assessed to tax He did not furnish the information required by the Commissioners but contended (1) that under the banking system in Trieste all sums deposited bore interest from the date of lodgment and therefore the remittance was of capital and not of income, (2) that the remittance was a loan to him from a trust of which he was trustee The Commissioners found as facts that the account in the Trieste Bank was an omnibus account that stood in the assessee's name as an individual and that as he had not attempted to discharge the onus that lay on him of distinguishing which part of the income was capital, the remittances must be presumed to be his income *Held*, that as the appellant had not disclosed the necessary information, the evidence before the Commissioners was sufficient to support the conclusions of fact at which they had arrived [44]

See also the case of *A T P M R M Murugappa Chettiar*,[45] in which it was held, following *Scottish Provident Institution v Allan*,[46] that the presumption was that remittances were of profits and that it was for the assessee to rebut the presumption

Debtor abroad—Interest received from—Not brought into British India—Accruing in British India, when—

See *Commissioner of Income tax, Madras v Subramanian Chettiar*[47] and *S V L L Lakshmanan Chettiar v Commissioner of Income tax, Madras*,[47a] as to the circumstances in which interest due from creditors abroad and not actually brought into British India but credited in the accounts of the assessee creditor in British India may be taxed on the footing that such income accrues in British India within the meaning of section 4 (1)

(3) This Act shall not apply to the following classes of income —

General—

The exemptions in this sub section remove liability for both super tax and income tax The income under these heads cannot be taken into account under 'total income' under section 16 In other words the income has to be completely ignored for *all* purposes under this Act Even if the income should fall under one of the heads described in section 6, it would neverthe

(44) *Schulze v Bensted* 8 Tax Cases 259
(45) 49 Mad 465, 2 I T C 139
(46) 4 Tax Cases 591
(47) 50 Mad 765
(47a) 3 I T C 421

less be exempt if it is covered by one of the sub clauses of section 4 (3) *See notes on income from usufructuary mortgages of land* under section 2 (1)

The fact, however, that income is exempt under section 4 (3) does not remove the liability to tax of employees of charities or other recipients of income from these exempted sources, if the employees or recipients are themselves taxable under the Act In fact in the 1886 Act there was an explicit provision to *the effect that "An officer or servant is not exempt from taxation* by reason only of the income of his employer being exempt therefrom "

Exemptions granted under section 60, on the other hand, stand on a different footing Those exemptions may be partial, and even if the incomes are wholly exempted they may be included in the 'total income' of the person under section 16, *i e*, in order to fix the rate at which he is taxable, if the exemption is granted on that condition

(*i*) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application, thereto

(*ii*) Any income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes

* * * * *

In this sub-section ' charitable purpose includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility

CHARITIES

History—

In the 1886 Act "any income derived from property solely employed for religious or public charitable purposes" was exempt, and there was *no definition anywhere in the Act of what* was 'property ' In the 1918 Bill as introduced the provision ran as below —

Any income derived from property held under trust or other legal obligation for religious or public charitable purposes in so far as that income is applied to those purposes In this clause 'charitable pur

pose' includes relief of the poor, education, medical relief and the advancement of any other object of public utility "

The Select Committee, however, considered that income derived from property which is held on a purely religious or charitable trust should be entirely exempted and that the Collector in such a case should not be bound to satisfy himself that the income is so applied In the case of mixed trusts, however, the Committee thought that the Collector might be properly required to enquire as to the application of the income The Committee also considered it necessary to add a provision exempting voluntary contributions received by religious or charitable institutions for religious or charitable purposes Since 1918 no change has been made in these two clauses of sub section (3) of section 4

'Property'—

There was no definition of 'property' in the 1918 Act, and the expression used in section 5 of that Act corresponding to section 6 of the present Act was *house* property Sections 3 and 4 were recast in 1922 In the 1918 Act the sub section of exemption (corresponding to section 4 (3) of the present Act) formed part of a section which merely dealt with the liability to tax of income *generally* which arose, accrued or was received in India or was so deemed In the 1922 Act, on the other hand, the main sub section of the section fixed the liability of "all income, profits or gains as described or comprised in section 6 " The insertion of these words altered (though unexpectedly) the interpretation to be placed on the sub sections relating to charities Sub section (3) of section 4 is only an exception to sub-section (1) of that section, and the same word cannot be used in two different senses in the same section, the more especially when the one part is only an exception to the other It would seem, therefore, that the definition of 'property' as given in section 9 "Buildings or lands appurtenant thereto" restricts the meaning of the word as used in 4 (3) (i) This result, however, was clearly unintended by the framers, and is confirmed by the use of the word 'property' in section 4 (3) (iv) where securities are referred to as 'property', in which context the definition in section 9 would make no sense The word therefore should evidently be construed in its wider sense

In In re *Lachhman Das Narain Das*[48] a firm was registered under section 2 (14) and the shares of the respective partners were divided in the following way —Madan Gopal, the head of

(48) 1 I T C 378

the firm, had seven annas in the rupee, Benarsi Das had three annas, Kunji Lal had three annas, and a charitable or religious object under the name of Radha Ballabh—a temple in Muttra—had three annas. The question was whether the share of income, of which 3/16ths in this case was undoubtedly devoted to charity, was within the exemption, that the answer was in the negative

Per Walsh and Lyles, JJ — In our view income derived from profits made by a trading concern in business, is not income derived from property held under trust. The provision in the deed in question is merely an allocation of the proportionate part of the profits to religious purposes. The exemption deals with a totally different subject matter. In most countries in a manner with which we in India are familiar, Government has, within certain limits, exempted from the ordinary liabilities to contribute to public revenue endowed property set apart by pious people, or held under pious trusts for purposes which are wholly religious or charitable or in the case of properties which are only partly so held, that part alone which is applied by the trust, or the instrument creating it, to religious or charitable purposes is granted an exemption, and the language used in section 4 (3) (i) is in our opinion appropriate to an exemption of that kind and to no other. It is impossible to hold, having regard to the terminology used in this Act that the profits of a trading concern are in any sense derived from property held under a trust or a legal obligation for religious purposes. That view is strengthened by a perusal of sections 9 and 10 in which the Legislature has demarcated the boundary line between property strictly so-called and a business and has laid down the circumstances under which income tax is payable upon property and payable upon profits derived from a business'

The reasoning in the above decision is not clear. All that their Lordships decided seems to be that the trading profits in question were taxable and the decision evidently was based on the facts of the case, having regard to the second sentence in the extract given above. The question whether securities or other endowments held wholly in trust would be 'property' within the meaning of this sub-section is still open. If 'property' is construed as defined in section 9, income from such securities should be taxed. If a different view were taken, as apparently it must be, 'property' must be construed in its ordinary meaning which is quite comprehensive, and it cannot be limited to Real Property only.

'Property is the generic term for all that a person has dominion over. Property is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have'[49]

(49) *Jones v. Skinner* 5 L. J. Ch. 90 (Stroud)

"It seems to me therefore that the word 'property' in the exemption *in question cannot import legal ownership It imports the right* of possession and exclusive enjoyment Moreover that is the ordinary meaning of the term The word 'property' is not a technical expression No one in ordinary language would speak of land or buildings vested in a trustee and in which the trustee has no beneficial interest as his property' I may observe that if your Lordships will turn to the Act of 1854 you will find the very expression property of the institution' used in more than one place to denote real and personal property held on trust for the purposes of the institution though not legally vested in the institution itself "[50]

The General Clauses Act (X of 1897) while not defining 'property' defines 'moveable property' as all property that is not immoveable 'Property' has been held to apply to debts, in certain circumstances, to choses in action of all kinds, to copy rights, *to patents*, to debentures and even *to Government annuities*, but even this wide interpretation cannot include the right to a future salary[1]

A possible distinction between income from business and that from property is that in the latter case the person to whom income accrues takes no active part in the operations producing profits, but this line of reasoning is ruled out to some extent by the decisions in Excess Profits Duty cases, of which the leading one is *Commissioners of Inland Revenue v South Behar Railway,*[2] *holding that it is possible to have a business without being busy*[1]

Either the widest possible meaning should be given to 'property', or the word construed as in section 9 There is no half way house between the two positions The Income tax Manual, however, contemplates the exemption of income from securities, etc, belonging to a charitable or religious institution (*see* paragraph 61, Income tax Manual), but says nothing about profits from business, etc

'Held under trust'—

These words refer to cases in which there is a regular trust

'Other legal obligation'—

This has not been defined, but the framers must clearly have had in mind obligations in the nature of trusts contemplated in sections 80 to 95 of the Indian Trusts Act That is to say, a

(50) *Per* Lord Macnaghten in *Mayor of Manchester v McAdam* 3 Tax Cases 491

(1) *Fogar v Commissioner of Income tax* 2 I T C 286

(2) 12 Tax Cases 657

formal trust is not necessary to secure the exemption[3] All that is required is a legal obligation to apply the income to charitable or religious purposes But mere entries in the assessee's books will not in themselves constitute a trust or other legal obligation[4]

Trust—Existence of—Question of fact—

Though it is not necessary in order to create a trust that the person or persons in whose favour the trust is created should know about it, the absence of such knowledge is a circumstance to be taken into consideration by the Commissioner in coming to conclusion as to whether or not there had been a real dedication to a charity and as to whether or not the fund so created or the trust so said to be created can be revoked This is purely a question of fact[4]

Wholly—

This word means 'solely' and not mainly See *Commissioner of Income tax v Maulana Malak*[5]

Property held in part for such purposes—

In such cases the Income tax Officer has to satisfy himself as to the actual application or setting apart of the income It is not necessary that the income should have been so applied *before the assessment or in the year of receipt It will be sufficient* if it is "finally set apart for application" to charitable or religious purposes 'Finally' evidently means irrevocably

Where the property is under trust or other legal obligation *wholly* for religious or charitable purposes, the Income tax Officer cannot enquire into the actual application of the income The trustee will take the consequences under the law for any breach of trust, but the Income tax Officer cannot refuse exemption on the ground that the income is not in fact being applied to the purposes of the trust Examples of partial trusts are where property is bequeathed subject to the maintenance of certain charities or when a manager of a charity gets a share of the trust income as his remuneration

Expenses of management—

Where property is held in part only for religious or charitable purposes, a proportionate share of any expenses incurred

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(3) *Eggar v Commissioner of Income tax* 2 I T C 286

(4) *Rm Ar Ar Rm Ar Arunachalam Chettiar v Commissioner of Income tax*, 3 I T C 38

(5) 105 I C 155

on management should be considered as applied to these purposes (paragraph 19, Income tax Manual).

Religious—

The word has not been defined, nor is a simple definition possible The English law forbids bequests for 'superstitious purposes' but there is no such prohibition in India Whether a particular purpose is 'religious' or not would depend on the circumstances of each case, on the personal law of the person concerned, and on custom Temples, mosques, mutts, schools for teaching theologies, recital of prayers, performance of sacrifices, etc, are all clearly 'religious' It is not clear, however, whether what is 'religious' according to the Christian religion would not be construed in India with reference to English practice

Charitable purpose—

The Act defines 'charitable purpose' as *including* 'relief of the poor, education, medical relief, and the advancement of any other object of general public utility ' Analogous definitions in other Acts are the following Section 3 of the Charitable Endowments Act (VI of 1890) defines 'charitable purpose' as including relief of the poor, education, medical relief, and the advancement of any other object of general public utility, but not a purpose which relates exclusively to religious teaching or worship The latter part of this definition is omitted from the definition in the Income tax Act, but 'religious' purposes also get the exemption under the Indian Income tax Act Section 17 of the Transfer of Property Act refers to 'religious and charitable' endowments as being 'for the benefit of the public in the advancement of religion, knowledge, commerce, health or any other object beneficial to mankind'

As the word used is 'includes', the definition is not exhaustive *But charitable* endowments which are neither religious nor meant for the advancement of some general public utility, are difficult to conceive of It the endowment is religious, the question of public utility does not arise It it is not religious, and at the same time it is meant to benefit a few persons, it can hardly be considered 'charitable' The words 'general public utility' however, should be construed, in a negative sense as not confined to the advantage of a few specified persons, and not as meaning to the benefit of the community generally irrespective of class or creed It would be quite sufficient if the benefit went to a section of the community See *Re Mellody*[6] a case of a bequest providing for an annual treat to some school children The point in

(6) (1918) 1 Ch 228

all such cases is that the donor does not intend the benefit to go to particular individuals nor to let them *claim* the benefit A trust or gift is not charitable merely because it is beneficial to the public,—*see* In re *Headmasters' Conference*[7] A benevolent purpose or a liberal purpose is not necessarily a charitable purpose[8] The guiding principle is given in *Re Nottage*[9] in which a testator endowed a cup for yacht racing, and the endowment was not considered charitable

Per *Kekewich, J* (whose judgment was affirmed by the Court of Appeal) — In order to uphold this gift as charitable, I think I ought to see that it is by itself directly, and *as its necessary and intended result*, beneficial to the community Almost any gift may in some sense be said to be beneficial to the community '

The point is that the avowed object must be the benefit of the community, that is, there can be no charity, without there being a charitable *intention*

Nor is it necessary that a 'charity' should benefit only the poor to the exclusion of the rich

' I am quite aware that a trust may be charitable though not confined to the poor but I doubt very much that a trust would be declared to be charitable which excluded the poor "[10]

' To ascertain whether a gift constitutes a valid charitable trust a first enquiry must be held whether it is public —whether it is for the benefit of the community or an appreciably important part of the community The inhabitants of a Parish or town or any particular class of such inhabitants may for instance be the objects of such a gift, but private individuals, or a fluctuating body of private individuals cannot If this test is satisfied, is it necessary to find further that the class is confined to poor persons to the exclusion of persons not poor? Is poverty a necessary element?"

Per Lord Wrenbury in *Verge* v *Somerville*[11] in which he cited with approval the dictum of Lindley, L J, quoted above and the Privy Council held that a valid charitable trust may exist although its benefit is not confined to the poor to the exclusion of the rich

The following are some of the Indian decisions as to what constitutes 'charities' A University which conferred degrees

(7) 10 Tax Cases 73

(8) *Per* Lawrence, L J, in *Trustees of Robert Marine Mansions* v *Commissioners of Inland Revenue* 11 Tax Cases 425

(9) (1895) 2 Ch 649

(10) *Per* Lindley, L J, in In re *Macduff*, (1896) 2 Ch 451

(11) (1924) A C 596

only and did not teach,[12] a professorship,[13] the construction or maintenance of a well or cistern for drinking water for men and animals[14], the construction or maintenance of a choultry, dharam sala or poor feeding house (Authorities hardly necessary, as such charities are so common in the country), a School[15], the giving of alms including food to the poor, fakirs, ascetics, travellers, etc [16] a dispensary or hospital [17]

On the other hand, while a University is undoubtedly a charitable institution, it is doubtful whether the income of a University not derived from its endowed funds but from its fees, etc, is exempt under this section To avoid doubt, however, the Governor General in Council has exempted such fees, etc, by Notification under section 60

A Hospital or School might well be not 'charitable'. Proprietary schools are not unknown in this country Before an institution can claim to be charitable, it must possess some eleemosynary feature A hospital conducted on business lines, which takes only paying patients is not a 'charitable' institution even though the profits be applied *inter alia* to the improvement of the premises [17] Nor, on the other hand, will the fact that some people pay for the benefits make an institution other than charitable, if on the whole it is really 'charitable', nor the fact that the charity does not go far enough [18]

Institution—

It is a word employed to express several different ideas It is sometimes used in a sense in which the institution cannot be said to consist of any person or body of persons who could strictly speaking, own property The essential idea conveyed by it in connexion with such adjectives as Scientific or literary is often no more than a system, scheme or arrangement by which literature or science is promoted without reference to the persons with whom the management may rest or in whom the property appropriated for these purposes may be vested save in so far as these may be regarded as a part of such system scheme or arrangement That is certainly a well recognised meaning of the word One of the definitions contained in the Imperial Dictionary is as follows

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(12) *University of Bombay v Bombay City Commissioners* 16 Bom 217

(13) *Manorama v Kalicharan* 31 Cal 166

(14) *Karuppa v Arumuga* 5 Mad 383 *Trucumdas v Khimji* 16 Bom 626

(15) *Hardisty v Secretary of State* 5 Cal 98 *Mazhar Hussain v Abdul Hadi* 33 All 400

(16) *Ganapati v Savitri* 21 Mad 10 *Piyenlralal v Raj Kumari* 34 Cal 5

(17) *St Andrews Hospital v Shearsmith* (1887) 19 Q B D 624 2 Tax Cases 219, *Blake v Mayor of London* (1887) 18 Q B D 437 2 Tax Cases 209

(18) *Trustees of Mary Clark Home v Anderson* (1908) 2 K B 645 5 Tax Cases 48

"A system plan or society, established by law or by the authority of individuals for promoting any object public or social"[19]

"It is a little difficult to define the meaning of the term 'institution' in the modern acceptation of the word It means, I suppose, an undertaking formed to promote some defined purpose having in view generally the instruction or education of the public It is the body (so to speak) called into existence to translate the purpose as conceived in the mind of the founders into a living and active principle"—Per *Lord Macnaghten* (*Ibid*)

There can really be no precise definition of an 'institution', but the word implies (1) a certain degree of permanency and (2) a certain public nature (2) is already conditioned by the adjective 'religious or charitable' both of which imply a public or semi public nature As regards (1), an individual collecting contributions for a casual charity could not claim exemption under this clause of the sub section Such income would be exempt but as casual receipts, etc, under clause (vii) The contributions should be *voluntary* and made without consideration The price paid for admission into the institution, for instance, would not be voluntary *See*, however, notes below

Applicable solely to religious, etc purposes—

The income of the institution should be applicable solely to religious or charitable purposes before it can be exempted It is not ordinarily the function of the Income-tax Officer to enquire whether in fact it is so applied All that he has to see is whether under the rules and constitution of the institution the income is *applicable* Where there is no clear condition in the rules of the institution, the fact that the income is not actually applied to the purpose may be evidence that it is not so applicable, and to that extent the Income tax Officer may enquire into the application of the income The word 'applicable' in clause (ii) is not so strict as the words "finally set apart for application" in clause (i)

A trust which, *inter alia*, among admittedly charitable purposes had for its objects the following, *viz* · "the agricultural, industrial, commercial and other pursuits" of a (religious) community, "entertaining guests, giving At homes and parties", "contributions to memorials, funds raised for holding social, educational, religious, industrial or political conferences or congresses and for public entertainments which the spiritual head of the community for the time being may deem fit," and in which no part of the property was set apart so as to be identified as appropriated exclusively for charitable or religious purposes, was held

(19) *Per* Lord Herschell in *Mayor of Manchester* v *MacAdam*, 3 Tax Cases 491

by the Privy Council to be ineligible for the concession under this section"[20]

Funds brought from abroad by a charity—

See *P L S K R Chetti* v *Commissioner of Income tax, Madras*[21] Set out under section 4 (2)

'Voluntary'—

What exactly the Select Committee had in mind in inserting 4 (3) (ii) is not clear, and in particular, what they meant by "voluntary contributions" It is also not clear whether the draftsman was influenced by the wording of similar provisions in the United Kingdom However that may be, if 'property' in clause (i) is construed in a comprehensive sense, it does not really matter what "voluntary contributions" mean If, on the other hand, it is read in a restricted sense, it is a matter of some importance what "voluntary contributions" connote In the United Kingdom where charities as such are not exempt but only in respect of specified sources of income, the meaning of the expression has been the subject of discussion"[22]—Per *Smith, J* —

"It was said that the word 'payment was synonymous with 'contribution and that the word 'voluntary did not mean gratuitous but meant given without compulsion In my judgment what is or is not a voluntary contribution must in each case depend on the object for which, and the object to which the contribution is made In each case it seems to me it must be a question of fact To pay £1 to a benefit match of a professional cricketer for his own pocket would I should say be a voluntary contribution To pay £1 to get access and right to a special seat upon the ground for the match I should myself not call a voluntary contribution at all I decline altogether to attempt to give an exhaustive definition of what are or are not funds voluntarily contributed, for if I did, I should as it appears to me land myself in the same difficulties in which the learned judges who decided the cases in question, as it appears to me got themselves into "

Law in the United Kingdom—

Under Schedule A (property tax) exemption is given to (1) public buildings and offices belonging to any college or hall in any University (not occupied by any member or by any person paying rent), (2) public buildings, offices and premises belonging to any hospital, public school or alms house (not occupied by any

(20) *Moulana Malak* v *Commissioner of Income tax, Central Provinces*, 3 I T C 408

(21) 4 I T C 185

(22) *Commissioners of Inland Revenue* v *New University Club* 2 Tax Cases 279

officer whose income amounts to £150 a year or by any person paying rent), (3) any building being the property of any literary or scientific institution which is used solely for the purpose of such institution and in which no payment is demanded or made for any instruction given there by lectures or otherwise (if the building is not occupied by any officer or by a person paying rent), (4) rents and profits of lands, tenements, hereditaments, etc, belonging to a hospital, public school or alms house, or vested in trustees for charitable purposes in so far as the income is applied to charitable purposes (till 1921 this did not extend to the premises owned and occupied by the charity), (5) under Schedule C—Government and other securities—on stock belonging to charities In 1921 exemptions were given (1) in respect of *Schedule B—occupancy tax—in respect of lands occupied by a* charity provided that the work in connection with the 'husbandry' is mainly carried on by the beneficiaries of the charity and the profits applied solely to the charity, (2) in respect of Schedule D—trading—if the work is mainly carried on by the beneficiaries of the charity and the profits solely applied to the charity The changes in 1921 were made at the instance of the Royal Commission on Income tax, which commented on the anomalous state of the law as it stood before Section 24 of the Finance Act of 1927 extended the exemption in respect of Schedule D profits to cases in which the trade is exercised in the course of the carrying out of the primary object of the charity, even if the trade is not carried on by the beneficiaries As a result of these changes, some of the decisions in England have become obsolete

It will be seen from the general outline of the exemptions to charities, etc, in the English law that the details of the English system are inapplicable to India As Pollock, M R put it in a *recent case* [23]

There is under the (United Kingdom) Income tax Acts no general exemption for charities as such from income tax Unless the charity can justify a claim to the particular exemption allowed in respect of tax collected under the several Schedules it remains liable to the tax"

On the other hand in India there is a general exemption in favour of charities The only English decisions therefore that can be of help, are those as to what is or is not charitable, etc, but even these have to be applied with caution

Under the English law all religious purposes are also charitable,[24] but certain purposes which would be religious according to non Christian or rather non Anglican standards would be

(23) *Brighton College v Marriott* 10 Tax Cases 235

(24) In re *White—White v White* (1893) 2 Ch 41, 52, *Commissioners of Income tax v Pemsel*, 3 Tax Cases 53

'superstitious' and not 'religious' A technical meaning has been assigned to the words 'charitable purposes' by the Court of Chancery in England Certain charitable objects were enumerated in the preamble to Statute 43 Elizabeth, c 4, but the Courts have given a very wide interpretation to the words The subjects are enumerated in the Mortmain and Charitable Uses Act, 1888, as below

> 'Relief of aged impotent and poor people maintenance of sick and maimed soldiers and mariners schools of learning free schools and scholars in Universities repair of bridges ports havens causeways churches sea banks and highways education and preferment of orphans relief stock or maintenance for houses of correction marriages of poor maids supportation aid and help of young tradesmen handicraftsmen and persons decayed relief or redemption of prisoners or captives aid in case of any poor inhabitants concerning payment of fifteenths setting out of soldiers and other taxes

The meaning of the words charitable purposes' in the income tax laws was threshed out in *Commissioners of Income tax v Pemsel* [55]

> Per *Lord Macnaghten* — In all English Statutes when there is no controlling context a technical meaning is attached to the word harity , and synonymous therewith is the word charitable as used in such expressions as charitable trust etc Charity in its legal sense comprises four principal divisions—trusts for the relief of poverty trusts for the advancement of education trusts for the advancement of religion and trusts for other purposes beneficial to the community not falling under any of the preceding heads The trusts last referred to are not any the less charitable in the eye of the law because they incidentally benefit the rich as well as the poor is indeed every charity must do either directly or indirectly The (Income tax) Act has nothing to do with casual alms giving or charity of that sort nor indeed has it anything to do with charity which is not protected by a trust of a permanent character The provisions of the Act are concerned with the revenue of established institutions—the income of charitable endowments

Note that as regards the fourth head, the benefit of the community, there is no mention of poverty

> The words in the preamble of 43 Elizabeth c 4 are not a definition of charitable cases but are a detailed statement of certain cases which are to be charitable and in dealing with the matter the course which the Court of Chancery has pursued has been to look at the enumeration of the charities in the statute and to include under the word charitable' any gift of funds for a public purpose which is analogous to those mentioned in the statute —*Per* Lord Wrenbury in *Verge v Somerville* [56]

(55) 3 Tax Cases 53
(56) (1924) A C 596

In a United States Sunday Act, charity has been held to include "everything which proceeds from a sense of moral duty or kindness or humanity for the relief or comfort of another and without any regard to one's own benefit or pleasure"[27]

Many of the leading cases in the United Kingdom do not apply to India because of the difference in the exempting provisions of the law already pointed out The most important group of cases culminating in *Coman v Rotunda Hospital*[28] decide that it is not the motives of a concern but whether it is run on 'business' lines and adopts 'business' methods that decides the liability to tax And it is for the charity seeking exemption to justify the particular exemption with reference to the different schedules under the Income tax Act In India, on the other hand, even a 'business' will be exempted if it is held under trust or legal obligation for charitable or religious purposes, assuming of course that "property" as used in section 4 (3) (1) includes a business, and the English cases are not therefore of much assistance In Malak's Case, 2 I T C 443, the Crown conceded that a business was included in property But *see* the decision of the Madras High Court in *Commissioner of Income tax v Thevara Patasala*[29]

Exemption of charities—Procedure in the United Kingdom—

Till 1925 the procedure for referring to the High Court questions relating to the exemption of charities was by a mandamus obtained from the High Court—*see* notes under section 66

Lands vested in trust—Rents and profits for religious purposes—

Lands were vested in trustees to apply the rents and profits in maintaining (1) the missionary establishments among heathen nations of the Moravian Church, (2) a school for the children of ministers and missionaries, and (3) certain religious establishments denominated choir houses *Held,* by Lords Watson, Herschell, Macnaghten, and Morris (Halsbury, L C, and Lord Bramwell dissenting), that the trust was one for "charitable purposes" within the meaning of the Income tax Acts In those Acts the words charitable purposes are to be interpreted, not according to their popular meaning, but according to their technical legal meaning[30] This is one of the leading cases on the subject Extracts from Lord Macnaghten's judgment have been given on p 393

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(27) *Doyle v L & B R R* 118 Mass 197
(28) (1921) 1 A C 1, 7 Tax Cases 517
(29) 2 I T C 171
(30) *Special Commissioners of Income tax v Pemsel,* 3 Tax Cases 53

Charity—Scottish Law—

In *Wilson and others* v *The Crown*[31] the Scottish Court of Session held that in Scotland a charity should be construed according to Scottish and not the English law

Hospital—Paying patients—

In *St Andrews Hospital, Northampton* v *Shearsmith*[32] a hospital received paying patients at remunerative prices and applied its surplus income to the extension and improvement of the hospital buildings *Held*, that the surplus was profit assessable to the income tax as the institution was not 'charitable' In *Needham* v *Bowers*[33] an institution for the insane in which some patients paid sufficiently well for all the inmates to be supported without payment and which was therefore self-supporting was held to be not 'charitable' although it was founded by charitable donations and made no profit In *Cawse* v *Lunatic Hospital, Nottingham*,[34] however, an asylum with substantial charitable endowments which took in patients at remunerative prices was considered to be 'charitable' The difference between these decisions was founded on the fact that in the one case the institution was chiefly dependent on the fees while in the other it was so dependent on the endowments

College—Endowed—Receiving fees—

A college was built and endowed to enable young women to carry on their studies after leaving school Each student paid in fees £90 a year or upwards, the receipts from the endowment being as to fees in the proportion of about two to one *Held* that the college was not exempt as a "charity school"[35]

See per Phillimore, J, in *Governors of Bradford Grammer School*[36] following the tests laid down in *Charterhouse School* v *Lamarque*[37] and *Southwell* v *Holloway College*[35]

'Now a school which is nearly self supporting but has some assistance from endowments is not a charity school A school which is almost entirely supported by endowments but gets some little assistance from fees paid by scholars is a charity school and in the same way a hospital which is almost entirely charitable is exempt as a hospital although it has a few paying patients *Per contra* if the hospital is almost entirely self supporting it is not exempt because it has some residual endowment The whole matter therefore is a question of degree

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(31) 5 A T C 378
(32) 2 Tax Cases 219
(33) 2 Tax Cases 360
(34) 3 Tax Cases 39
(35) *Southwell* v *The Governors of Holloway College* 3 Tax Cases 356
(36) 6 Tax Cases 136
(37) 2 Tax Cases 611

Charities—Contingent and not exclusive—

Mr Joseph Rank by an indenture made in March, 1917, settled upon trustees certain funds, to be held, together with the income thereof, upon trust "for the benefit of such persons, institutions or purposes as the said Joseph Rank shall by any writing under his hand or by will appoint" In default of any such appointment the trust funds and income were to be held by the trustees upon trust for the benefit of the Wesleyan Methodist Church The whole of the income of the trust for the three years ended 5th April, 1918, 1919 and 1920 was applied by the trustees to certain charitable institutions in accordance with written directions given at various dates by Mr Joseph Rank The trustees applied for repayment of the income tax which had been deducted at the source from the trust income during the above three years on the ground that under the deed of trust the income in question was applicable to charitable purposes only and had been so applied *Held*, that inasmuch as the settlor possessed under the deed of settlement power to execute an appointment in favour of purposes that were not charitable, the deed did not create a trust for charitable purposes only, although ultimately powers were exercised by the settlor in favour of charity [38]

Common pastures—Grazing charges used for the benefit of—

The freemen of Bootham Ward had possessed certain rights of common pasture over certain lands By a certain statute some of these lands were vested in the Mayor of the place, for the benefit of the freemen Grazing charges were made upon 'non freemen', and these sums were used for the benefit of some of the widows of the freemen Claim was made that the property was legally appropriated and applied in a manner expressly prescribed by Act of Parliament, and also that the property was legally appropriated and applied for a charitable purpose *Held*, (1) that the manner of the enjoyment of the property, or the income of it, was immaterial, and that the words of the sub section were satisfied if the property was appropriated, in express terms, to a prescribed object (2) that although an interpretation short of, and different from, the technical meaning assigned to the term "charitable purposes", by the Courts and adopted by the House of Lords in the Income tax case of *Pemsel*,[39] should be given to the same term in the Corporation Duty Act, yet that interpretation should be a sufficiently wide and liberal one It would not, however, include a case in which the beneficiaries of

(38) *Rex v The Special Commissioners of Income tax* (*Ex parte Rank s Trustees*) 8 Tax Cases 286

(39) 3 Tax Cases 53

the charity had no right to the benefits and received them only through the consent of the real owners, *viz*, *the freemen*[40]

It will be observed that "legally appropriated, etc," occurring in all these English cases corresponds to 'trust or other legal obligation' in the Indian law

Mutual Benefit Association—

The objects of an institution were to afford relief to decayed members in distress, sickness and old age, and to aid widows and protect children Subscription was an essential condition of membership, but relief was claimable only where the circumstances were necessitous, and no members were entitled as of right to such relief, an absolute discretion in the matter vesting in the directorate *Held*, that the institution was not a charitable institution, but substantially one for the mutual benefit of the subscribing members, who in the event of the directors misapplying the rules or declining to act upon them according to their proper construction, would have a right to redress in a Court of Equity[41]

Trade Societies—Benefit restricted to members—

Exemption claimed on behalf of a Scotch Incorporated Trade Society on the ground that its income was legally appropriated and applied to a "charitable purpose" *Held*, (1) that the meaning of the words "legally appropriated" is that the appropriation must be of such a kind as to create a legal obligation upon the part of the administrators of the property, to apply it in a particular manner, (2) that funds belonging to an incorporated body which are derived from entry moneys of members, and are solely applicable as pensions to decayed members, or widows of members, at the absolute discretion of a governing body, are not to be regarded as funds "legally appropriated and applied for any charitable purposes" within the meaning of the statute[42]

Masonic Lodge—

A Grand Lodge of Masons claimed exemption in respect of the income of certain funds devoted to the relief of necessitous Masons, or their dependents, at the discretion of the administering bodies Every Mason by whom, or by whose dependents, benefit was received from the funds, had to some degree contributed thereto through his Lodge, but the funds were largely de

(40) In re *Boothan Strays York Commissioners of Inland Revenue v Scott and others* 3 Tax Cases 134

(41) *The Linen and Woollen Drapers etc, Institution v Commissioners of Inland Revenue* 2 Tax Cases 651

(42) *The Incorporation of Tailors in Glasgow v Commissioners of Inland Revenue*, 2 Tax Cases 297

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(38) *Rex v The Special Commissioners of Income tax* (Ex parte *Rank's Trustees*) 8 Tax Cases 286

(39) 3 Tax Cases 53

to that at all He does not join the Masons as a Benefit Society, but in order to participate in the other benefits of Freemasonry, and the actual contributions which go to the making of each particular fund are not at all limited to those funds, but some of them come from purely charitable sources and some from other funds which are voted by the Grand Lodge I think, therefore it comes to be a question of degree If you take, for instance, an extreme case at the other end, nobody could suppose, if, say an hospital (or in this part of the world we should call it an Infirmary) was endowed certainly for a charitable purpose, it would not exempt the Corporation, from the fact, which undoubtedly would be a fact, that some patient might in past years have given a subscription to the hospital I think that is an extreme case at the other end I think this case is nearer that than a complete Benefit Society, which you had in the Incorporation of Tailors

Per *Lord Mackenzie*—It appears to me that the question whether a particular fund falls within the exemption of the statute or not is largely a question of degree If the objects of the Corporation are purely mutual benefit, if the individual corporators make their contributions as an investment, the case would be governed by the principles laid down in the *Incorporation of Tailors in Glasgow* [45] From the bye laws which govern the Tailors' Incorporation it appears that all that was left was for the mutual benefit of the individual members So too in the English case Re *The Linen and Woollen Drapers, etc , Institution,*[46] which was founded upon by the Crown it appears from the opinion of Pollock B that the institution was a Mutual Benefit Society As the rules are not printed in the Report it does not appear upon what grounds this opinion was reached, but the opinion of the Lord President in the Incorporation of Tailors in Glasgow is referred to and adopted by Hawkins J, in his judgment

In the present case it does not appear to me that the contributions by individual Freemasons are of such a character or amount as to necessitate the Court arriving at the conclusion that the funds in question are not legally appropriated and applied for a charitable purpose The individual pays not to any of these funds but to a daughter lodge and makes these payments in order to become a Freemason From the rules the consequence results that a small proportion of his contributions goes to these funds That, however is not the main object he has in view when he makes his contribution He makes his contribution in order to share in the benefits of Freemasonry, and this is not confined to making payments from these funds [47]

Temperance Council—Not charitable—

The Temperance Council of the Christian Churches of England and Wales, the principal object of which was united action to secure legislative and other temperance reform, was

(45) 2 Tax Cases 297
(46) 2 Tax Cases 651
(47) *Grand Lodge, etc, of Masons, etc v Commissioners of Inland Revenue,* 7 Tax Cases 116

considered not to be a 'charitable' institution, but an institution established for political purposes as its object was to secure legislative reform [48]

Simplified Spelling Society—

A trust the fund of which was to be distributed to the Simplified Spelling Society or to any other similar society or association was not considered to be charitable [49]

Widows and orphans of medical men—Society for the relief of—

This Society was formed in 1788 and later on incorporated by a Royal Charter in 1864 According to the Charter the object of the Society was to relieve the widows and orphans of the deceased members who might need assistance, and according to the same Charter the Society claimed to unite the advantages of a provident with those of a benevolent society, inasmuch as by a small yearly subscription the members were enabled to protect their widows and orphans from destitution should they need relief, and it was benevolent inasmuch as its benefits were conferred only in straitened circumstances The funds of the Society were raised by interest of moneys, legacies and donations, and subscriptions of members By far the greater portion of the members were in such circumstances that the dependents would not in the ordinary course require relief *Held*, that the funds of the Society were solely devoted to the relief of individuals and that this was a 'charitable' purpose on the authority of the decisions given in the Court of Chancery [50]

Medical Charitable Society—

This Society was established to help (1) members disabled by illness or accident and in needy circumstances, (2) the dependents of deceased members in necessitous circumstances, and (3) in the education of the children or disabled members The members of the Society were also themselves eligible for relief and subscriptions and donations were received also from persons unconnected with the medical profession This case was decided along with the case of the Society for the Relief of Widows and Orphans, etc, and it was held in the same judgment that this Society also was 'charitable' [1]

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(48) *Commissioners of Inland Revenue* v *The Temperance Council etc* 10 Tax Cases 748

(49) *Trustees of Sir G B Hunter* v *Commissioners of Inland Revenue* 8 A T C 149 73 S J 284 45 T L R 344

(50) *Spiller* v *Maude* 32 Ch D 158 followed, *Cunnack* v *Edwards* 12 T L R 614 Re *Clarke* 1 Ch D 497, distinguished, *Commissioners of Inland Revenue* v *Society for the Relief of Widows and Orphans of Medical Men*, 11 Tax Cases 1

(1) *Commissioners of Inland Revenue* v *Medical Charitable Society for the West Riding of Yorkshire* 11 Tax Cases 1

Per *Rowlatt, J*—"A purely mutual society among very poor people whose dependents would be quite clearly always poor would not, I think, be a charity, it would be a business arrangement That would not be a charity (the beneficiaries in the present case) have not the right to anything, the funds are vested in trustees who have to do their duty, of course faithfully, but they have to select the objects with a view to making as far as their resources go, a due and fair relief of indigence Is that really a bargain mutually between the members for mutual relief limited to the contingency of indigence, or is it really only a means of qualifying for the receipt of what is in itself a charity? The immateriality of the element of private subscriptions seems to be emphasised in the case of *Spiller v Maude*

Nursing facilities—Society giving—

An association whose object was the provision of nursing facilities to poor people had three classes of members paying subscriptions at different rates, the bulk of the members being in the lowest class Facilities were given only to members, in most cases at less than cost, the deficit being met out of donations or income from investments of donations, etc, from the public *Held*, that the association was charitable[2]

Library—Corporate body, of—

A Corporate body possessed buildings which were occupied as a library, and owned also mortgages, railway shares, and bank deposits It claimed total exemption *Held* (1) that the Society's library was not property "legally appropriated and applied for the promotion of education, literature, science, or the fine arts" (note the difference in the wording of the English and the Indian law), (2) that the income of the Society was exempt only to the limited extent that it was legally appropriated by contract to the perpetual endowment of a chair of conveyancing in the University of Edinburgh , (3) that the words "legally appropriated" did not mean "lawfully" appropriated, but that the appropriation was to be of such a kind as to be legally binding upon the parties[3]

Library—Free—Partly used for Subscription Library—

A building belonging to the Magistrates and Town Council of Dundee was used mainly as a Free Library, but in one of the rooms accommodation was afforded by special arrangement for the books belonging to a Subscription Library These books were under the control of the Librarian of the Free Library, and after

(2) *Commissioners of Inland Revenue v Peeblesshire Nursing Association* 11 Tax Cases 325

(3) *Society of Writers to the Signet v Commissioners of Inland Revenue*, 2 Tax Cases 257

being a year in circulation among the subscribers were handed over to, and became the absolute property of, the Free Library *Held* that the building was not within the exemption in favour of buildings used solely for the purposes of a literary or scientific institution[4] (In India a literary or scientific institution would, unless a proprietary institution, be charitable if it was an educational institution, as it would in most cases be, or an institution of public utility)

Library—Free—

A building was owned by a Municipal Corporation and was maintained for the purposes of a Free Library under the provisions of the Public Libraries Act, 1892 *Held* (by Lords Herschell, Macnaghten and Morris, Halsbury, L C, dissenting), that the building was within the exemption from income tax granted to Literary or Scientific Institutions[5]

University College—

The University College of North Wales was founded to provide instruction in all the branches of a liberal education except theology It derived income from investments of which a part was appropriated specifically to various educational purposes, and part applied to the general purposes of the College *Held,* that the College was a Corporation established for "charitable purposes" only within the meaning of the Income tax Acts, that the revenues applied to the general purposes of the College were applied to "charitable purposes" only, and that the College was entitled to exemption[6]

Institution of Civil Engineers—

Exemption claimed on the ground that the property and income of the Institution of Civil Engineers, were legally appropriated and applied for the promotion of science *Held,* by Lords Watson and Macnaghten (Lord Halsbury, L C, dissenting), that the primary object of the Institution was the promotion of science in the abstract, and that the property and income were legally appropriated by Charter, and applied in fact to that object, that, if the further object of the advancement of the professional interest of members was to be also inferred, it was at least secondary to the main and chief object[7]

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(4) *Musgrave* v *Magistrates and Town Council of Dundee* 3 Tax Cases 552

(5) *Mayor etc of Manchester* v *McAdam* 3 Tax Cases 491

(6) *The King* v *The Commissioners for Special Purposes of the Income tax* (Ex parte *University College of North Wales*), 5 Tax Cases 408

(7) *Commissioners of Inland Revenue* v *Forrest* 3 Tax Cases 117

Royal College of Surgeons—Library, Museum Buildings—

The Royal College of Surgeons was incorporated "for the advancement of the science of surgery within Her Majesty's Dominion" It granted various surgical qualifications, and was both an examining and teaching body in surgical subjects *Held*, that the objects of the College were mainly professional, that it was not a 'scientific institution' and was therefore not entitled to exemption for buildings belonging to it, used as a library, museum, etc, for the purposes of the College The question being a mixed one of fact and law, this judgment did not follow that of the House of Lords in *Commissioners of Inland Revenue v Forrest*[8]

Per *Lord Adam* —" If in the sense of the Act the main and leading purpose of the institution is the advancement of science it will not be the less entitled to the exemption claimed because it aids incidentally, consequentially, the promotion of professional purposes, and that appears to be the case, or very much so of the Institution of Civil Engineers in London On the other hand if the main and leading object be that of advancing a profession, then that it may also incidentally and as a consequence of that, promote science will not (the less) make it other than a professional institution '[9]

(The Indian law does not give any exemption to a scientific institution unless it is 'charitable', and such an institution is not 'charitable' as its object is 'professional', and not educational or of 'general public utility')

Property of the Royal College of Surgeons—Income not legally appropriated for promotion of science of surgery—

By the Customs and Inland Revenue Act, 1885, a duty was imposed by way of compensation to the Revenue for Death Duties which obviously cannot be levied on Bodies Corporate and Unincorporate, the rate of Duty being five per cent per annum on the net annual value, income and profits of real and personal property belonging to such bodies "Property which, or the income or profits whereof shall be legally appropriated and applied for any charitable purpose or for the promotion of education, literature, science, or the fine arts" [48 and 49 Vict, c 51, section 11, sections (2) and (3)] (Customs and Inland Revenue Act, 1885) was exempt, and the Royal College of Surgeons claimed exemption from this duty *Held*, that the College had two main objects neither of which was subsidiary to the other (1) The promotion of the science of surgery (2) The promotion of the practice and encouragement of surgery including the interests of those practising surgery as a profession, and including also the examination

(8) 3 Tax Cases 11"
(9) *Sulley v Royal College of Surgeons Edinburgh* 3 Tax Cases 173

of students and others to qualify for practice or honours in surgery There was no legal obligation either to apply the property or the income to the first main object, or not to apply them to the second main object, and as there was no appropriation by the college by conveyance, declaration of trust or otherwise, there was no "legal appropriation" for a purpose exempting from duty Neither was the property and income brought into charge "applied" so as to exempt it from duty [10]

Technical education—

A college imparting technical education in all branches of the woollen industry and maintained mostly out of subscriptions from woollen manufacturers was held to be an educational institution [11]

Agricultural Society—

A society, numbering about 3,000 members, unincorporated and without any deed of trust, held annual shows and interested itself generally in the improvement of agriculture, including *inter alia* the improvement of agricultural lands The income comprised gate money, subscriptions, etc, and the excess of income over expenditure was invested *Held* by the Court of Appeal that there was a charitable purpose [12]

General Medical Council—

The objects of the above Council in England were to keep a Register of Medical Practitioners and regulate their conduct, to supervise and control medical studies and examinations and to prepare and to revise from time to time the British Pharmacopœia It was held by the Court of Appeal that the purpose of the Council was not charitable [13]

Following the above case it was held that the General Nursing Council for Scotland the purpose of which was partly educational and partly the professional advantage of registered nurses was not charitable [14]

An association does not however cease to be one with a charitable object merely because incidentally and in order the better to carry out the charitable object it is necessary to cover certain special benefits to members [15]

(10) *The Royal College of Surgeons of England* v *Commissioners of Inland Revenue* 4 Tax Cases 344

(11) *Scottish Woollen Technical College* v *Commissioners of Inland Revenue* (C *of* S) 11 Tax Cases 139

(12) *Commissioners of Inland Revenue* v *Yorkshire Agricultural Society* 6 A T C 862

(13) 7 A T C 121

(14) 1929 S C L T 441, 8 A T C 384

(15) See per Atkin L. J., in *C I R* v *Yorkshire Agricultural Society*, reaffirmed by the C of A in *Geologists' Association* v *C I R* 7 A T C 293

Convalescent Home—

A home established for the benefit of members of the drapery and allied trades obtained its income from the original endowment and other investments, from donations and subscriptions from concerns in the trades and from payments by visitors. The persons using the home were convalescents from illness, persons requiring rest and change of air and persons taking a holiday, and the last class had to pay higher rates than the others. The visitors were admitted either on the recommendation of the donor and subscriber firms or on special letters of introduction.

Held, by the Court of Appeal, following Re *Estlin*[16] and Re *Gardom,*[17] that there was charity.[18]

Temperance refreshment rooms—

The object of a trust was "to assist the inhabitants of Falkirk by providing them with comfortable rooms where wholesome refreshments may be obtained, where they are free from the temptation of intoxicating liquors." The trustees maintained two cafes, in one of which prices were charged as in ordinary restaurants and in the other at lower rates in order to benefit the working classes. There were free reading and recreation rooms. The trustees avoided making profits as far as possible.

Held, that the promotion of temperance was a charitable object, and that as the only way in which the trust could be given effect to was by the adoption of commercial methods, that feature should be ignored and that the trust should be exempt. Lord Sands however thought that if the Crown had shown that there was a separable branch working at a profit, it might have been different.[19]

School in receipt of full fees—Not a charitable institution—

A school in which full fees are paid by the students, and the surplus is devoted to the improvement of the College, is not a 'charitable institution' but conducts a 'trade'—decided by the Court of Appeal in *Marriot v. Brighton College*, reversing the decision of Rowlatt, J.

Per *Scrutton L J* — When any person habitually and as a matter of contract supplies money's worth for full money payment he trades within the meaning of Schedule D. This is not a case where persons subscribe to enable transactions to be carried on which could not be carried on by the commercial returns alone.

(16) 72 L J 687

(17) (1914) 1 Ch 662

(18) *Commissioners of Inland Revenue v. Trustees of Roberts Marine Mansions*, 11 Tax Cases 425

(19) *Commissioners of Inland Revenue v. Falkirk Temperance Cafe Trust,* 11 Tax Cases 353

This decision was upheld by the House of Lords[20]

Associations for promoting the interests of the teaching profession and the cause of education—Not charitable—

An Association formed for the promotion of the interests of the teaching profession in Preparatory Schools, though it also furthered the advancement of education was considered to be not 'charitable'.[21]

The Headmasters' Conference—an Association for the protection of the interests of the teaching profession, the settlement of disputes affecting members of the profession, etc, though the association was interested in the cause of secondary education generally, was similarly treated to be not 'charitable'.[22]

Per Lord Eldon in *Morice* v *The Bishop of Durham*[23]—quoted in *R* v *Special Commissioners* (Ex parte *Rank's Trustees*)[24] and again in the Headmasters' Conference case above "The question is whether, if upon the one hand he might have devoted the whole to purposes in this sense charitable he might not equally according to the intention, have devoted the whole to purposes benevolent and liberal and yet not within the meaning of charitable purposes as this Court construes these words"

The mutual intellectual benefit of members is not a charitable purpose, otherwise every club could be a charitable institution The nature of the purpose is a question of fact.[25]

Benevolent Society—Commercial methods—

In *Trustees of Psalms and Hymns* v. *Whitwell*[26] it was held that the business of selling a hymn book was a trade, even though the resulting profits were distributed among widows and orphans of ministers and missionaries In *Religious Tract and Book Society* v *Forbes*[27] in which the society, whose primary object was the diffusion of religious literature, incidentally carried on a bookselling shop it was considered to that extent to be engaged in a trade. At the same time it was held that a colportage agency carried on by the same society in which the chief business was not so much that of pushing the sale of the goods as that of administering religious advice was not a trade—Per *Lord President Robertson*.

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(20) 10 Tax Cases 235

(21) *R* v *Special Commissioners* (Ex parte *the Incorporated Association of Preparatory Schools*), 10 Tax Cases 73

(22) *R* v *Special Commissioners* (Ex parte *the Headmasters' Conference*, 10 Tax Cases 73

(23) 10 Vesey 532

(24) 8 Tax Cases 286

(25) *Geologists' Association* v *C I R*, 14 Tax Cases 271, 7 A T C. 300

(26) 3 Tax Cases 7

(27) 3 Tax Cases 415

"While the establishment and conduct of the colportage all rest upon the same ultimate motive, yet at the same time the two operations seem to be essentially distinguished The shops are simply book seller's shops—the other is a combination of the sale of books with a missionary enterprise "

A Society formed for the improvement, spiritual, mental, social and physical, of young men, carried on a Restaurant, as well as Educational Classes, Gymnasium and Publication Department, the restaurant was carried on on the usual commercial principles, and was open to the public *Held*, that the Association was liable to income tax on the profit made by the Restaurant

Per *Ridley, J*—"I cannot escape from the conclusion that the object is to carry on the Restaurant as a trade consistently with the other objects of the Association The Association would indeed carry it on even without a profit, with a view no doubt of benefiting the other objects of the Association, yet I think it is carried on as a trade' It is conducted on the usual commercial principles [28]

These three decisions were cited with approval in *Coman v Rotunda Hospital*[29] in which it was held that a hospital which let its rooms for entertainments and meetings was carrying on a trade See also *Brighton College v Marriott*[30] These decisions, however, are partly obsolete even in the United Kingdom, in view of the amendments in the law there in 1921 and 1927 So far as India is concerned these decisions are inapplicable if the profits are, under trust or legal obligation, to be used for charitable or religious purposes within the meaning of the Indian Act *See* notes on page 392

It was held, however, in *Commissioner of Income tax v Thevara Pathasala*[31] by the Madras High Court, following the above decisions in the United Kingdom and the decision of the Allahabad High Court in *In re Lachmandas Naraindas*[32] (the latter, however, was not based on the United Kingdom rulings), that a business conducted by a charity should be held liable to income tax if it competed with other businesses that paid income tax At the same time the decision was not based on the interpretation of 'property' in the restricted sense in which that word is used in section 9

(28) *Grove v Young Men s Christian Association* 4 Tax Cases 613
(29) 7 Tax Cases 517
(30) 10 Tax Cases 235
(31) 2 I T C 171
(32) 1 I T C 378

Property vested in charity—Not exempt before it is settled—

The exemption can be claimed only in respect of the income arising after the property vests in the charity Under section 3, an assessee is to be assessed on the income, profits and gains of the previous year, and the fact that certain income received during the current financial year is derived from property held upon trust for charitable purposes, does not prevent the liability of the assessee to be taxed on such income received during the previous year before the property was settled [33]

If a charitable trust arises out of a will, it takes effect, in the absence of anything to the contrary, from the date of the testator's death, and income which accrued before that date is not exempt even though actually paid to the trust [33a]

The following English case may also be noted Mr Denzil Thomson died on the 15th November, 1914, leaving the residue of his estate to Dr Barnardo's Homes National Incorporated Association The testator's next of kin contested the will, and the proceedings were compromised by the Association making over to the next of kin one third of the residuary estate The proceedings delayed the division of the residuary estate, and the investments constituting and representing the same, remained under the control of the Executors until May, 1916, between which date and December, 1916, two thirds of the investments were transferred to the Association and one third to the testator's next of kin The income arising from the investments received under deduction from such income during the period between the date of the testator's death and the dates of transfer by the Executor amounted to £498 0 11

The Association applied for repayment of two thirds of that sum, *viz*, £332 0 7, as being the income tax on income payable to the Association, and applicable, and in fact applied, by it solely for charitable purposes

Held (*i*) that the assent of the Executors to the bequest to the Association of the residue of the estate did not relate back to the date of the testator's death, (*ii*) following the decision in *Lord Sudeley v Attorney General*[34] that, prior to the ascertainment of the residue, the Association, as residuary legatee, had no interest in the testator's property, that the taxed income of the estate prior to such ascertainment was income of the Executors, and that it was not received by them as trustees on behalf of the Association, and (*iii*) that the Association was, therefore,

(33) *Commissioner of Income tax v Bai Jerbai Nowrosji Wadia* 1 I T C 255

(33a) *Marie Celeste Samaritan Society v Commissioners of Inland Revenue*, 11 Tax Cases 226

(34) (1897) A C 11

not entitled to claim repayment of the income tax deducted from the income[35]

The law in the United Kingdom was however altered as a consequence of this decision by section 30 of the Finance Act of 1922, and a part of the income accruing in the interval will be now treated as income of the charity

(*iii*) The income of local authorities

Local authorities—

The income of local authorities has always been exempt in India In the United Kingdom, on the other hand, they have been exempt only in respect of such profits as result from public services within the area of the local authority, the argument being that such profits are not profits at all and merely represent the surplus paid by the persons constituting the local body, *i e*, the local citizens[36] Local authorities have to pay income tax on 'property', on investments and on profits made by selling gas, water, etc, to areas outside the jurisdiction of the authorities. The essential thing to bear in mind in grasping this distinction between the United Kingdom and India is the difference in the historical setting of the two countries Local authorities in India to day are almost all of them creations of Government, whereas many local authorities in the United Kingdom are of long standing and have submitted only in recent years to control by Government and only because they depend on Government for subsidies

(*iv*) Interest on securities which are held by, or are the property of, any Provident Fund to which the Provident Funds Act, 1897, [37] applies, * * *[38]

Exemption of Provident Funds—

Under section 4 (3) (*iv*) the interest on securities held by certain provident funds under section 4 (3) (*i*) capital sums paid as accumulated balances at the credit of subscribers to such funds and under section 15 (1) contributions paid by subscribers to such funds up to a certain limit are exempt from the tax The words accumulated balance are intended to include not only contributions and subscriptions but also interest thereon These provident funds are only those to which the Provident Funds Act of 1897 applies that is the provident funds of public servants or *quasi* public servants the constitution and control of

(35) *The King v Commissioners for the Special Purposes of the Income tax Acts* (ex parte *Dr Barnardo's Homes National Incorporated Association*) (1921) 2 A C 7, 7 Tax Cases 646

(36) See *Dublin Corporation v MacAdam* 2 Tax Cases 387

(37) *See* now Act XIX of 1925

(38) The words "or any Provident Insurance Society to which the Provident Insurance Societies Act 1912 is or but for an exemption under that Act, would be, applicable" were omitted by section 4 of Act XI of 1924

which are regulated by the Provident Funds Act and the rules made thereunder The exemption granted to Provident Funds which comply with the provisions of the Provident Insurance Societies Act, 1912, or which have been exempted from the provisions of that Act has been withdrawn by the Income tax (Amendment) Act 1924 (XI of 1924) Provident Insurance Societies to which the Provident Insurance Societies Act applies or which have been exempted from its provisions and which were in existence before the 1st April, 1924, will continue to enjoy the exemptions under section 4 (3) (ii) and (i) and section 15 (1) to which they were entitled under Act XI of 1922 before it was amended by the Act XI of 1924 These concessions cannot be claimed by any other Provident Insurance Societies Nor can they be claimed by any private provident funds whatever irrespective of whether they had previously been exempted by Local Governments, by a general or special order from the provisions of the Provident Insurance Societies Act, 1912

These remarks refer to the money in the funds and to the payment by subscribers and contributions made by employees to these funds The contributions by *employers to Provident Funds* stand on a totally different footing and are dealt with in paragraph 49, but the special privileges conferred by these particular sections do not apply to any funds which have not a recognised legal footing

A special exemption has been granted (*see* exemptions under section 60) in the case of Railway Provident Funds but this applies only to the gratuities paid out of these funds in the event of the retirement or death of the subscribers (Income tax Manual para 20)

As regards recognised provident funds", see sections 4 (3) (iv), 15 and chapter IX A

Meaning of the word "securities" as used in section 4 (3) (iv)—

The definition of the phrase interest on securities' in section 8 of the Act should not be applied to determine the interpretation to be given to these words in section 4 (3) (ii), since the words as used in section 8 are in a specially restricted sense, and do not cover, for example, interest on so typical a form of security as a mortgage Nor should the meaning of the word 'securities" in section 4 (3) (ii) be restricted to the ordinary limited legal sense, in which it must always have reference to a loan Provident Funds are entitled to invest in any trustee security, and it has not been the intention of Government to discriminate between the various classes of investments which are thus legally authorised The word "securities" in section 4 (3) (ii) should therefore be interpreted as covering all securities mentioned in section 20 of the Indian Trusts Act (Income tax Manual, para 21)

History—

The Provident Funds Act of 1897 has been repealed by the Provident Funds Act, 1925 (XIX of 1925), which is now in force The Act applies to all Government and Railway Provident Funds and to such provident funds as may have been established for the benefit of its employees by any local authority as defined in the

Local Authorities Loans Act, 1914, to which the Local Government may by notification extend the Provident Funds Act

The exemption in this sub section was formerly given by Notification In 1918, the exemption was incorporated in the Act

Also *see* notes under section 8

Court of Wards servants—

In an estate under the Court of Wards, the officers are appointed by Government, their salaries are fixed by them whose orders he must obey The receipt of salaries from the estate merely means that Government direct the officers to help them selves to a limited extent from the estate funds, *i e*, Government direct the Ward to pay for a particular class of Government employees Whether a person is an employee of a particular authority for the purpose of the Provident Funds Act depends on whether membership of the fund is controlled by that authority and not on from which sources the employee's salary is paid or on the legal relationship between him and that authority *Held* accordingly that a servant of the Court of Wards is a Government servant for the purpose of the Provident Funds Act [39]

(v) any capital sum received in commutation of the whole or a portion of a pension, or in the nature of consolidated compensation for death or injuries, or in payment of any insurance policy, or as the accumulated balance at the credit of a subscriber to any such Provident Fund

Capital sums—Insurance policies etc —

The exemption was formely given by Notification under the Act of 1886

The receipt of insurance money in instalments is a capital receipt and not income See *I D Laud* v *Inland Revenue* [40]

The insurance policy need not necessarily be a life insurance policy, but as regards insurance against loss of profits, or loss of circulating capital, *e g*, trading stock,—*see* notes under section 10 (2) (ix) Such receipts are not capital

While commuted values of pensions are exempt, lump sum gratuities in lieu of pension are taxable under section 7 except gratuities received by Railway servants, which have been specially exempted under section 60 The position is anomalous and presumably due to the fact that the framers of section 7 had in mind recurring gratuities, *i e*, voluntary payments forming

(39) *Rutherford* v *Commissioner of Income tax Bihar and Orissa*
(40) 7 A T C 422

perquisites of office and not the lump sum gratuities that are often paid in lieu of pensions, *e g*, to Government servants who have not rendered sufficient service to entitle them to a pension

It was ruled in *Rutherford's Case* by the Patna High Court that as in the case of terms like 'penalty' and 'liquidated damages', the real nature of a transaction should be examined, and that merely calling a payment a gratuity will not make it such if it is really of the nature of a commuted pension A lump sum actuarially equated to a hypothetical pension is a commuted payment of pension for the purpose of this clause It is not necessary that a pension should be first sanctioned, or even claimable as of right Further the concession given by this clause is not confined to pensions granted by Government

The word 'insurance' has not been defined in the Act

"There is no magic in the words insurance or guarantee whether the transaction is the one or the other depends on the character of the contract itself "[41]

From the use of the word 'such,' it will be seen that the provident funds contemplated by this clause are the same provident funds as those contemplated in the previous clause, namely, those to which the Provident Funds Act applies It follows therefore that the concession given in this clause, does not apply to private provident funds in commercial houses, etc Such of these private provident funds as conform to the provisions of chapter IX A and are "recognised provident funds" get the benefits given by that chapter and by sections 4 (3) (*ix*) and 15 As regards other provident funds, *i e*, neither 'recognised under this Act nor governed by the Provident Funds Act, if the provident funds are constituted under an irrevocable trust over which the employers have no control, the contributions made by the employers may be treated as admissible deductions from their business profits, under section 10 (2) (*ix*) The employees' contributions are not entitled to any exemption from income tax under section 7, when they are deducted from pay The capital sum accumulated from such contributions paid by the employee will be automatically exempt when the money is withdrawn on the ground that (*a*) the accumulation is capital and not income and (*b*) the part of it other than interest has already been taxed either in the hands of the employer or in those of the employee But the portion which represents the employer's contribution, will be taxed when the accumulation is withdrawn from the provident fund Such accumulation forms part of the income of the em

(41) *Per* Romer J., in *Seaton* v *Heath* (1899) 1 Q B 782 (Stroud)

ployee in the year in which the money is withdrawn So also the accumulated interest.

(*vi*) any special allowance, benefit or perquisite specifically granted to meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit

History—

In the 1886 Act, the corresponding provision was partly contained in the definition of 'salary' which ran as below:—

"Includes allowances, fees, commissions, perquisites or profits received in lieu of or in addition to a fixed salary in respect of an office or employment of profit, but subject to any rules which may be prescribed in this behalf, it does not include travelling tentage horse or sumptuary allowances, or any other allowance granted to meet specific expenditure "

Perquisites or benefits not capable of conversion into money—

The provision in section (3) (2) (*ix*) of the Act of 1918 that "any perquisite or benefit which is neither money nor reasonably capable of being converted into money" was not liable to tax, has been omitted in the Act as the existence of that provision made it impossible to assess to income tax for example rent free residences in cases where the assessee had not the power to sub let, while rent free residences were liable to the tax where the assessee had the power to sub let An explanation has been added to section 7 (1) of the Act specifically providing for the taxation of perquisites in the form of rent free residences

Under section 7 (1) of the Act all perquisites received by an employee in lieu of or in addition to salary or wages are liable to the tax House rent allowances and the value of rent free quarters form additions to the remuneration of an employee, and even where residence in a particular town or building is necessary for the proper performance of the employee's duties such allowances or perquisites cover expenses of a personal character which the employee would otherwise have to incur They do not therefore "meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit," and are therefore not covered by the exemption in section 4 (3) (*vi*) of the Act and are taxable under section 7, or section 12

Two conditions have to be fulfilled before the exemption specified in section 4 (3) (*ii*) can apply The expenses incurred by the employee must be wholly and necessarily incurred in the performance of his duties as an employee and the allowances or perquisites must have been granted by the employer with the said purpose of meeting the extra expense thus caused to the employee, and *that* extra expense only It is thus a question of fact in each case whether a house rent allowance or the value of rent-free quarters is exempt from the tax but the following examples will serve to indicate the lines on which the decision should be made —

(*a*) A currency officer is granted rent free quarters in his currency office Even though his residence in that office is necessary

for the proper performance of his duties, he will be liable to the tax on the value of his rent free quarters, since he would in any case have had to provide himself with a residence, and the perquisite does not therefore meet expenses wholly incurred in the performance of the duties of an office or employment of profit

(b) A firm in Calcutta makes a practice of providing its employees with rent free quarters, and houses some of its employees in its business premises as resident clerks The employees of the firm, including the resident clerks, will, *as in the previous case, be liable to* income tax on the value of their rent free quarters

(c) A Government office has its headquarters in Bombay, but proceeds for some months in the year elsewhere, and grants its minis terial establishment house rent allowances or rent free quarters in the place to which it proceeds, with the specific object of providing for the maintenance of a second and, from the point of view of the grantees un necessary residence in order that they may perform their duties there The allowance or the value of rent free quarters will be exempt from income tax

In all cases where rent free houses form part of the perquisites of an employee the cash value of such a house to the occupier should, in no case be deemed to be more than 10 per cent of the salary of the employee (It should be noted that this maximum limit is a pure con *cession granted by executive orders*)

Such perquisites as (for example) tiffin, domestic services or the value of passages by rail or steamer provided by employers free of charge for their employees are not taxable because they are not convertible into money and there is no special provision in the Act in regard to them as there is in regard to rent free quarters, but passage money paid in India by an employer to his employee to enable him to go on leave is liable to tax If, however, passage money is remitted by the employer to the United Kingdom or a Colony and paid there to an employee on leave in such country, it should be regarded as a leave allowance covered by the exemption (19 A) in paragraph 16

The "Delhi moving allowance" and "Delhi Camp allowance" which are granted to the members of the office establishments of the Army Headquarters and of certain civil attached offices of the Govern*ment of India, during the period of their stay at* Delhi, and the Simla House rent Allowance granted under Rule 19 of the Simla Allowances Code and the value of rent free quarters in lieu thereof, fall under ex ample (c) above, and are exempt from the payment of income tax Special allowances granted solely to meet the higher cost of living in a station such as compensatory local allowances and the *Cutch exchange compen* sation allowance are liable to the payment of tax Rewards granted to officials for passing compulsory examinations must be distinguished from grants made to assist candidates to meet the expenses of preparing for such examinations Such tuition grants fall under section 4 (3) (ii) of the Indian Income tax Act (XI—1922) and are not liable to tax even if they are paid only to the successful candidates (Income tax Manual, para 22)

Wholly and necessarily—

The words 'wholly and necessarily' are stricter than the word 'solely' used in sections 10 (2) (*ix*), 11 (1) and 12 (1) That is to say, while in respect of income from business, profession or other sources, a deduction may be made on account of expenditure wholly incurred for the purpose of earning the income, in the case of salaried persons a deduction may be made only if the allowance is given for meeting expenditure which is not only wholly incurred in the performance of the person's duties but also *necessarily* incurred

Expenses—

Means actual disbursements, not allowances for loss of time (*Jones* v *Comorthen*) [42-44] The position is made clear, in the sub section, by the word "incurred" "Incurred" can only mean that there has been, or would be, an actual outgo, and notional expenditure cannot be 'incurred' except by express provision to that effect Actual outgo, however, need not be in cash

Perquisite—

The word dates from feudal times, and meant casual income arising to a feudal chief (*see* Stroud) The meaning of the word was considered in *Tennant* v *Smith*,[45] which decided that a 'perquisite' should be capable of conversion into money before it can be taxed This was the law in India also till 1922 and there was a clause in the corresponding section in the Act of 1918 exempting 'perquisites not capable of conversion into money' This was given up in 1922 Doubts however were felt as to the meaning of section 7 in the present Act, and the explanation under it was added to remove them, *see* notes under section 7 (1)

In MacDonald v *Shand*[46] in which the question was whether a 'perquisite' should be taxed on the year's income as part of salary or on an average of 3 years (this question cannot arise in India), Lord Birkenhead said "Infinite disputation is possible as to what, in different contexts, may be the proper connotation of a term such as 'perquisite' In one context it may have a bad or an irregular connotation, in another it may be normally ranged under payments which are both frequent and regular in commercial transactions "

Uniform—Grant—In lieu of—

A detective sergeant in the employment of a Municipal Corporation, was assessed on his salary which included a cash

(42-44) 1 O.L.J Ex 401
(45) (1892) A C 150 3 Tax Cases 158
(46) 8 Tax Cases 420

allowance given to him for clothing in lieu of free supply of uniform The clothing which the officer must purchase with the cash allowance was specified, and was subject to the approval of a superior officer The allowance for clothing was not regarded as income for superannuation purposes, and, apart from this allowance, detective officers received the same rates of pay as uniformed officers *Held,* that the allowance was a payment accruing to the assessee by reason of his office and was assessable to income tax, *Fergusson v Noble*[47] The Court suggested, however, that it would only be fair to permit such detectives to deduct from their income the expenditure incurred by them in making clothes suitable for their duties, and this is reported to be actually allowed in the United Kingdom in practice, though it cannot be claimed legally

Provident Scheme—Employee's Contribution—

A sum of £35 was placed to the credit of the assessee—a teacher in Dulwich College, under the Provident Scheme for the Assistant Masters of the College Of this sum, no part was payable until the assessee left the College, or until his decease, he could not raise money on it, and as regards one moiety, payment was contingent on a certain length of service and on good conduct *Held,* that the whole sum was a taxable addition to the assessee's salary[48]

Boarding—Cost of—Deduction from wages—

A man and his wife were employed at an asylum at separate fixed salaries payable weekly, but were given board, lodging, etc, the necessary deductions being made from their wages *Held,* that the assessees should be assessed on their gross income[49]

Per *Rowlatt J*—"These (i e cases like *Tennant v Smith*) are the cases in which there is a fixed salary paid plus something else (But) if we get a case where a person is paid a salary and out of that salary has to pay a counter amount to secure himself some necessaries there is no relevance in the question whether what he gets by the counter payment can be disposed of for money He has been paid a salary, and what he does with the salary is immaterial"[50]

Clergyman—Necessary expenses—

A minister of the Church of Scotland was allowed to deduct—

(1) expenses actually incurred in visiting the members of his congregation living beyond the limits of his parish,

(47) 7 Tax Cases 176
(48) *Smyth v Stretton*, 5 Tax Cases 36
(49) *Tennant v Smith* 3 Tax Cases 158, distinguished
(50) *Cordy v Gordon* 9 Tax Cases 304

(2) travelling expenses incurred in the discharge of duties imposed on him by his ecclesiastical superiors, (3) cost of stationery, and (4) communion expenses, but not the cost of books or the rent of the part of his house used for his work [1]

Clergyman—Expenses of removal from one curacy to another—

The expenses incurred by a curate removing from one curacy to another which he had taken up, were held not to be expenses incurred wholly, exclusively and necessarily in the performance of his duties as a curate, and were, therefore, inadmissible as deductions in arriving at his liability to income tax [2]

Motor-cycle—Cost of—For going to place of work—

A storekeeper employed by a shipbuilding company contended that, owing to the abnormal shortage of houses in that town, he was compelled to take a house at some distance outside, and claimed to deduct from his salary the expenses of maintaining a motor cycle to get to his work The General Commissioners on appeal allowed the deduction sought, but the Crown appealed against this *Held,* that the expenses in question were not incurred in the performance of the duties of the office, and that the deduction claimed was not admissible [3]

Domestic servant—To take place of mistress—

A man and his wife were appointed master and mistress of a school on a joint salary The master claimed a deduction of £30 in respect of the cost of a domestic servant employed to carry on the duties of his household while his wife was engaged at the school *Held,* that this was not an expense incurred in the performance of the duties of the offices of master and mistress of the school [4]

Clergyman—Expenses of—

A clergyman claimed deduction in respect of his expenditure on (1) Horse and Carriage, (2) Communion Elements, (3) Process of Augmentation, and (4) Pulpit Supply during holidays The Commissioners had only allowed so much of the amounts claimed under heads (1) and (2) as they were satisfied had in fact been incurred "wholly, exclusively and necessarily in the performance of his duty", and had altogether disallowed the amounts claimed under heads (3) and (4) *Held* as regards (1) and (2) that the amount allowable was a question of fact, and that the finding of the Commissioners thereon was final, and,

(1) *Charlton v Commissioners of Inland Revenue,* C S 1890—27 Sc L.R 647
(2) *W Friedson v The Rev F H Glyn Thomas* 8 Tax Cases 302
(3) *Andrews v Astley,* 8 Tax Cases 589
(4) *Fowers v Harding* 3 Tax Cases 22

as regards (3) and (4) that the allowance had been rightly refused[5]

Recorder—Travelling expenses of—

A member of the Bar who resided and practised in London was appointed as Recorder of Portsmouth He claimed as deductions from his assessable income the expenses incurred by him in travelling from London to Portsmouth and back, and hotel expenses at Portsmouth *Held*, that the deductions were inadmissible

Per *Lord Chancellor Cave*—' They are incurred not because the appellant holds the office of Recorder of Portsmouth but because living and practising away from Portsmouth he must travel to that place before he can begin to perform his duties as Recorder and having concluded those duties desires to return to his home They are incurred not in the course of performing those duties but partly before he enters upon them and partly after he has fulfilled them

' A man must eat and sleep somewhere whether he has or has not been engaged in the administration of justice Normally he performs those operations in his own home and if he elects to live away from his work so that he must find board and lodging away from home that is by his own choice and not by reason of any necessity arising out of his employment nor does he as a rule eat or sleep in the course of performing his duties but either before or after their performance "

Per *Lord Blanesburgh*—" Undoubtedly its most striking characteristic is its jealously restricted language some of it repeated apparently to heighten its effect '[6]

On the analogy of the above case it was held in *Nolder* v *Walters*, 9 A T C 251 that the cost of a telephone kept at an employee's residence *to facilitate his receiving instructions from his employers is not an admissible* deduction from his taxable income On the other hand if the employee incurs out of his pocket expenditure over and above any allowance given by his employers for the purpose of discharging his duties such extra expenditure can be deducted

Boarding—Cost of—

A was entitled to pay at £30 plus free board, lodging, washing and uniform valued at £40 per annum Later on the free allowances with the exception of the uniform were abolished, and an increased rate of pay given, but the cost of food, etc, was deducted from the pay every week *A claimed that the board*, lodging etc, were not convertible into money and that only the net money received after deduction for food, etc, should be taxed The General Commissioners held that *A* had not entered into any fresh contract for service when the method of remunerating him was changed and that his claim was corr t *Held*

(5) *Jardine* v *Gillespie* 5 Tax Cases 263
(6) *Ricketts* v *Colquhoun*, 10 Tax Cases 118

that the Commissioners were wrong and that the gross salary should be taxed[7]

Per *Roulatt, J*—"If a person is paid a wage with some advantage thrown in, you cannot add the advantage to the wage for the purpose of taxation unless that advantage can be turned into money But when you have a person paid a wage with a necessity—the contractual necessity if you like—to expend that wage in a particular way, then he must pay tax upon the gross wage, and no question of alienability or inalienability arises the question is whether he is paid a wage, part of which he has to expend in a particular way by way of counter account, or whether it is that he receives as his wages the net sum after allowing these amounts "[8] (Confirmed by the Court of Appeal)

Perquisites—Not capable of conversion into money—Free residence —Value of—Whether income—

A banking company assigned to its agent, as a residence, a portion of the bank premises occupied by them, in respect of which they were assessed to income tax The agent was required to reside in the buildings as the servant of the bank, and for the purpose of performing the duty which he owed to his employers *Held,* that the value of the residence was not an emolument of office in respect of which the agent was chargeable with income tax, and was not to be included in estimating the total amount of the agent's income, for the purposes of a claim of abatement[9]

A Minister of the Free Church of Scotland claimed that the annual value of the manse occupied by him which was vested in trustees and which he could not let was not to be taken into account in calculating his total income for the purposes of his abatement *Held,* that the annual value of the manse did not form part of his income for such purposes[10]

(These decisions are not applicable to India in their entirety, in view of the explanation to section 7 (1), *see* notes on that section)

In another case, in which also, a minister of the Established Church claimed that the annual value of his manse was not to be taken into account in calculating his total income for the purpose of his abatement but he could let the manse it was held that the annual value of the manse formed part of his

(7) *McLoughlin* v *Machon* 5 A T C 381 (C of A)
(8) *Cordy* v *Gordon* 9 Tax Cases 304, *Bell* v *Cribble* 4 Tax Cases 522, followed
(9) *Tennant* v *Smith,* 3 Tax Cases 158 (H of L)
(10) *M'Dougall* v *Sutherland,* 3 Tax Cases 261

income for such a purpose, and *M'Dougall* v *Sutherland* was distinguished[11]

(vii) any receipts, not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employee

History—

Section 4 (3) (*vii*) was introduced at the instance of the Select Committee, in 1918, to remove doubts There was no express provision under the previous law, *i e*, of 1886, except to a certain extent indirectly, in the definition of 'salary', and there are no decisions on the subject under that Act In practice, such income was most probably not taxed, considering the imperfect administrative machinery at that time

Casual gains—

In order to obtain exemption as "casual", profits must comply with two conditions—

(1) they must not be the proceeds of a profession, vocation or employment, or arise from business, that is from "any venture or concern in the nature of trade, commerce or manufacture" [*See* section 2 (4)] and

(2) they must not be annual

Both these conditions must be fulfilled The exemption also is specifically not to apply to any gratuity to an employee for services rendered, so as to avoid the possibility of any ambiguity in connection with the use of the word gratuity ' in section 7 (1) The following are illustrations of the effect of the provisions of section 4 (3) (*vii*) —

(1) *A* purchases a house with a view to re selling it at a profit His profits from the transaction are liable to income tax (even although it be an isolated transaction) *B* purchases a house for his own residence, and later on, sells it at a profit His profit is not liable to the tax

(2) *A* wins a prize in a lottery, or a bet on the race course His receipts therefrom are not taxable *B* is a book maker His profits from betting are taxable

(3) *A* is a professional beggar His receipts from mendicancy are not exempted from the tax by this sub section

(4) *A* makes a practice of speculating in the purchase and sale of shares His profits therefrom are liable to the tax *B* purchases Indian War Loan 1929 1947 at 95 redeemable at par The premium received on redemption after a period of years is not liable to the tax On the other hand the yield from Treasury Bills, arising from their

(11) *Corke* v *Fry* 3 Tax Cases 335

issue at a discount and repayment at par after 12 months or some shorter period is liable to the tax under section 12, though, as this yield is not interest, the tax is not deducted at the source under section 18 (3)

(5) A man writes a book His receipts from its sale are taxable

(6) Lump sum legacies are exempt annuities granted under a will are not exempt (Income tax Manual, para 23)

Casual—

Condition (2) in the above paragraph is based on the English law 'Casual' in the Indian Act does not mean the same as "not annual" According to Murray's New English Dictionary, 'casual' means—

"subject to, depending on or produced by chance accidental fortuitous, occurring or coming at uncertain times not to be calculated on, uncertain unsettled occurring or brought about without design or premeditation, coming up or presenting itself 'as it chances' "

As to the meaning of the word 'annual', however, see *Ryall* v *Hoare* cited *infra*

Non recurring—

As to the meaning of the word 'non recurring' *see* decisions cited *infra,* and particularly In re *Chunilal Kalyan Das* [12] There is nothing in the Indian law to prevent receipts recurring within the same year but not arising out of a business, vocation, etc , being taxed, even though the receipts may not recur beyond the year and the above instruction, in the Income tax Manual, perhaps goes beyond the law in exempting such income

Continuity of transactions—

Example (2) in the Income tax Manual above Even an outsider—not a book maker—can be taxed if the transactions are so continuous as to suggest that betting is a regular occupation of the person, or if the profits from betting come to him regularly —see however *Graham* v *Green* cited below

Example (5) —This is based on the assumption that a person who writes a book exercises the vocation of authorship But a person who writes a book, or invents machinery once in his lifetime, and sells the copyright or patent outright for a lump sum, cannot be taxed on the receipts, because that would be a capital receipt But if the person writes more than one book, or invents more than one appliance or machine, or if the book or invention is such that it can be reasonably inferred that he could not have done the work except as part of his normal

(12) 1 I T C 419

profession or vocation, the income would clearly be taxable *See the case of Sir Hari Singh Gour*[12a]

Profession—

Per L J Scrutton in *Inland Revenue Commissioners v Maxse*[13]

> It seems to me as at present advised that a profession in the present use of language involves the idea of an occupation requiring purely intellectual skill or manual skill controlled as in painting and sculpture or surgery by the intellectual skill of the operator as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities
> It appears to me clear that a journalist whose contributions have any literary form as distinguished from a reporter exercises a profession and that the editor of a periodical comes in the same category It seems to me equally clear that the proprietor of a newspaper or periodical controlling the printing publishing and advertising but not responsible for the selection of the literary or artistic contents does not exercise a profession but a trade or business

Occupation—

Occupation means the Trade or calling by which a person seeks his livelihood"[14] or the business in which he is usually engaged to the knowledge of his neighbours (*ibid*) and the statement of which would be 'sufficient to identify him to persons who have had dealings with him"[15] (The above with reference to the Bills of Sale Acts) Under the Libel and Registration Act when applied to a person, it means his trade or following (Stroud) In interpreting restrictive covenants it has been held that teaching or carrying on a school is a 'calling', notwithstanding that the calling may be under an illegal organisation *e g* Society of Jesus[16]

Vocation—

> I do not think employment necessarily means a case in which a person is set to work by other men to earn money A man may employ himself in order to earn money in such a way as to come within that definition but I think the word vocation is a still stronger word It is admitted to be analogous to the word calling' which is a very large word it means the way in which a man passes his life and it is a very large word indeed In my opinion if a man were to make a systematic business of receiving stolen goods the Income tax

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(12a) 3 I T C 346
(13) (1919) 1 K B 647 12 Tax Cases 41
(14) *Luck n v Hamlyn* 31 L T 366
(15) *Throssell v Marsh* 53 L T 321
(16) *Galwey v Barden* (1899) I L R 514

Commissioners would be quite right in assessing him There is no limit as to its being a lawful vocation "[17]

"'Vocation' and 'calling' are synonymous terms, and if anybody were asked what was the calling or vocation of these gentlemen, the answer would be 'professional book makers' "[18]

Remuneration—

Is a wider term than salary (*see* Stroud) It means a *'quid pro quo'* for service rendered If a person was in receipt of a payment or a percentage or any kind of payment, which was not be an actual money payment, the amount he would receive annually in respect of this, would be 'remuneration'[19]

Law in the United Kingdom—

The United Kingdom law is as below There is no specific exemption in the Acts in the United Kingdom, as in India, of casual income, but the profits may be taxed only if (i) they arise from a 'trade'—Schedule D, Case I, or (ii) are *annual* profits or gains from other sources—Schedule D, Case VI, or (iii) arise from a vocation, occupation, profession or employment—Schedule E or Schedule D, Case II (Other items in the Schedules are hardly relevant for the purpose)

'Trade' means, for this purpose, practically the same as though a little narrower than 'business' under the Indian law Tax under Case I, Schedule D, was till recently levied on an 'average' basis of 3 years, and set off is also allowed of losses in other trades in the same year But under Case VI, neither concession is allowed

Whether particular transactions constitute a 'trade' or not, has been held to be a question of fact *See* rulings under sections 2 (4), 'Business' and 3, 'Capital or Income' In *Graham* v *Green*[20] (cited below)—the General Commissioners held that the profits from backing horses, were in the circumstances of that case, liable to income tax Rowlatt, J, reversed the decision, and the Crown did not appeal In *Stubbs* v. *Cooper*[21] (cited below)—the Special Commissioners held that the profits from speculating in cotton futures, were not, in the circumstances of that case, liable to income tax—whether under Case I or VI,—not liable under Case I, because there was not sufficient continuity in the business to constitute them into a 'trade', nor under Case VI because they were pure gambling transactions, *i e*, irregular, and not recurring at intervals

(17) *Per* Denman J in *Partridge* v *Mallandaine* 2 Tax Cases 129
(18) *Per* Hawkins J *ibid*
(19) *Per* Blackburn, J, in *R* v *P M G*, 1 Q B D 663
(20) 9 Tax Cases 309
(21) 10 Tax Cases 29

Rowlatt, J, reversed the finding, and held that the profits were from trade, (Case I) but the Court of Appeal (the M of R dissenting) reversed the decision of Rowlatt, J, on the ground that the question was one of pure fact As regards the second part of the finding of the Commissioners, which involved a question of law, the Court of Appeal *held that the profits were taxable* under Case VI as 'other annual profits', *i e*, not from trade (The M of R considered that a question of law was involved in the finding as to 'trade', and that Rowlatt, J, rightly reversed the decision of the Special Commissioners) It was observed in this case

Per *Atkin L J*—' I think that the principle in respect of wagering is this that it takes two parties to make a bet "

*But where a cotton broker enters into a speculative tran*saction in futures with a cotton dealer, the transactions are not purely wagering transactions, as they rest upon "real and enforceable contracts in which the differences could have been sued for, on one side or the other " The distinction is not very clear If the enforceability of contracts is a relevant consideration in determining whether transactions constitute a 'trade' or 'business', profits from betting cannot be taxed except under the head 'professional earnings' as profits and gains from a profession, as in the case of a book maker Other profits on speculative transactions would be taxed under Case I or VI, according as the transactions constituted a 'business' or not

As to how far speculative transactions constitute 'trade', Atkin, L J, said

For my part I see some difficulty in trying to form an opinion of a trade which consists of entering into transactions which would merely result in differences and when the supposed trader never intends *to get possession of any commodity so that he may in fact have the* disposal of it by himself or to any third party " [2]

The meaning of the word 'annual' as used in the English Income tax Act schedules with reference to 'annual profits and gains', was discussed in great detail by Rowlatt, J, in *Ryall v Hoare*, cited *infra*

Rewards—Examinations—Prizes, etc —

A somewhat difficult case, though of no importance from the fiscal point of view, is the taxation of rewards granted by an employer to his employees for passing examinations, etc, or fees paid to examiners, etc That such receipts are, generally speaking, casual and non recurring is obvious, though, in respect of fees from examinations, cases may and do arise, in which such

(22) 8 Tax Cases 521

fees are recurring Assuming that the income in question is casual and non recurring, it is often a difficult question to decide whether the rewards or fees arise from a profession or occupation If, for instance, the passing of an examination is obligatory, the income undoubtedly accrues by virtue of the assessee's office, and is therefore taxable as salary If, on the other hand, the passing of the examination is optional, it may still be income arising from his profession It is irrelevant for the purpose whether the income is of such a nature that the recipient can sue and recover it or not The point is that the income should be by virtue of the office or profession This, of course, is essentially a question of fact Thus, even if the examination was optional, it still might be that the reward received by the examinee, arose out of his office, if a person not holding the office would not be eligible for the reward

Rewards for arresting or tracing offenders, would not be taxable, if paid to a person whose ordinary duty was not that of arresting or tracing offenders, but if paid to a man whose main duty was that, for example, to a Police Officer, or an Excise or Opium Officer or a Customs Officer, these rewards would undoubtedly be taxable, as they would arise from the office or profession A prize given for an essay would not be taxable but not so the premia received by, say, an architect, who frequently tendered plans invited by public competition Similarly, fees for setting or valuing examination papers, would clearly be taxable if such duties were part of the assessee's professional or other duties Even if it was not part of his official duties, a person who is an expert in a subject, and who is frequently called upon to examine in it, would still be taxable, but the tax would be not a part of 'salary', but 'income from other sources' Examples of this would be a professor in a college setting papers for a University, or a lawyer setting papers in law See *Sir Hari Singh Gour's Case*[23] Border line cases are easily conceivable, for example, a Government servant, say, a policeman setting a paper for a University in a subject like Mathematics or History, for a number of years in succession In such a case, the presumption would be that he was an expert in that particular subject, and exercised the vocation of an examiner Fees for giving expert evidence are clearly taxable, as they undoubtedly arise from the exercise of a profession Similarly, fees paid to a Government servant for doing work for local bodies, which are first credited to Government, and then paid to the officer, are clearly taxable as part of the salary, and so also honoraria paid by Government to its officers

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(23) 3 I T C 350

Gifts—Recurring—

The position of a recurring voluntary gift is slightly different in the United Kingdom and in India In the former country two conditions are necessary before such income can be exempted —

(1) it should not arise from a profession, vocation or business,

(2) it should not be annual profits or gains Condition (1) is the same in India also, but (2) is different, the corresponding condition being that it should be 'casual and non recurring', but it need not be 'profits or gains' to make it liable to tax though it must be income and not 'capital' The word used is 'receipts', not 'profits or gains' An allowance granted by a father to his son, would clearly not be taxable under the United Kingdom law, as both the conditions above referred to, would be satisfied Such an allowance, though 'annual', would not be 'profits or gains' In India, on the other hand, the second condition of exemption would not be satisfied, as the gift would be 'receipts' or 'income' though not 'profits or gains', and it would not be non recurring 'Receipts' and 'income' are wider expressions than 'profits or gains' In practice, however, in India Income tax Officers do not tax such gifts

Legacies—

During the discussion in the Assembly when the present Act was passed, it was suggested that legacies should be expressly exempted, Mr G G Sim replied on behalf of Government as below

Sir this point was discussed in the Joint Select Committee and hey were advised by the legal authorities consulted that legacies were clearly covered by sub clause (3) (vii) of the Bill The insertion of the word legacies would I think throw a doubt on the question of whether sums similar to legacies such as gifts are also included if they are not specifically mentioned I am not a lawyer, Sir, but I would abide by the advice which was given by my lawyers "

The above refers to lump sum legacies, as regards recurring payments under wills, *see* section 12 Such payments are clearly taxable both in India and in the United Kingdom though the machinery of taxation is different in the two countries

Decisions—

The decisions set out below have been grouped under three heads —(1) speculative transactions; (2) isolated transactions, (3) profits from employment, vocation, etc There is, however, a considerable amount of overlap as between these three classes Similarly there is an overlap between these decisions and those

cited under section 2 (4) as to what constitutes 'business', under section 7 as to what constitutes 'perquisites' or additions to salary, and under section 3 as to the distinction between Capital and Income The rulings set out under these three sections should therefore be also referred to

As regards unlawful transactions, *see* rulings set out under section 3

Betting—Book-maker—Profits of—

A person who attends races, and systematically bets, is liable in respect of the profits he derives from the vocation of betting, *i e*, that of a book-maker[24]

On the other hand, in the case of a person whose sole means of livelihood was betting on horses, from his private residence, with book makers at starting prices, it was *held* that the earnings were neither profits nor gains[25] The *ratio decidendi* was that there must be a certain amount of organisation before there could be profits or gains

Per *Rowlatt J*— The question arises under Case II and under Case VI of Schedule D It arises under Case VI upon the question whether the winnings on his bets as bets are profits or gains within the meaning of that case It arises under Case II on the question as to whether assuming the winnings from the bets themselves are not profits or gains, the aggregate of his winnings as the result of his sustained and continued action are the profits or gains of a vocation within the meaning of Case II or possibly it might have been put a trade or adventure within the meaning of Case I it is the same question really

My attention of course was drawn to my decision in *Ryall* v *Hoare*,[26] which was the case of a gentleman who had guaranteed an overdraft for a company of which he was a director he got a commission for it and that is the only time in his life he ever did anything of the sort The question before me there was not whether a commission paid to a man for a service of this kind was a profit or gain in itself which it obviously was for commercial services rendered but whether it was an *annual* profit or gain In the course of my judgment I said that a mere receipt by finding an object of value or a mere gift was not a profit or gain and I hardly feel much doubt about that I further said that the winning of a bet did not result in a profit or gain Until I am corrected I think I was right in that Whether it is a gift or whether it is a finding there is nothing of which there is a profit There is no increment there is no service there is merely the picking up of something either by the will of the person who had it before or because there is no person to oppose the picking up

(24) *Partridge* v *Mallandaine* 18 Q B D page 276
(25) *Graham* v *Green* 9 Tax Cases 311
(26) 8 Tax Cases 521

When you come to the question of a bet it seems to me the position is substantially the same What is a bet? A bet is merely an irrational agreement that one person should pay another person something on the happening of an event *A* agrees to pay *B* something if *C's* horse runs quicker than *D s* or if a coin comes one side up rather than the other side up There is no relevance at all between the event and the acquisition of property The event does not really produce it at all It rests as I say on a mere irrational agreement

So much for Case VI But then there is no doubt that if you set on foot an organised seeking after emoluments which are not in themselves profits you may create by way of a trade or an adventure or a vocation a subject matter which does bear fruit in the shape of profits or gains Really a different conception arises a conception of a trade or vocation which differs in its nature in my judgment from the individual acts which go to build it up just as a bundle differs from odd sticks You may say I think without perhaps an abuse of language there is something organic about the whole which does not exist in its separate parts

It is said that this gentleman by continually betting with great shrewdness and good results from his house or from any place where he could get access to the telegraph office had set up a vocation That is contended by the Revenue on the facts of his case and certainly the contention is one which if sound has very startling results because a loss in a vocation or a trade or an adventure can be set off against other profits and we are face to face with this result that a gentleman earning a profit in some recognised form of industry but having the bad habit of frequently persistently continuously and systematically betting with bookmakers might set off the losses by which he squandered the fruits of his industry for income tax purposes against his profits—a very remarkable result indeed and one I am afraid of very wide application We have allowances to a man because of the family he has to support and we are now threatened with a further allowance in respect of the loss which he makes by habitual betting It certainly sounds very remarkable and entitles a person when he wastes his earnings by betting to make the State a partner in his gambling However the question must be faced

As I have said there is no doubt that you might create a trade by making an organised effort to obtain emoluments which are not in themselves taxable as profits and the most familiar instance of all of course is a trade which has for its object the securing of capital increment A person who buys an object which subsequently turns out to be more valuable and then sells it does not thereby make a profit or gain But he can organise himself to do that in a commercial and mercantile way and the profits which emerge are taxable profits not of the transaction but of the trade In the same way he may carry on the same trade or part of the trade by selling things which he has not got and buy them when the price has fallen That is a capital accretion only the operations are reversed He sells first and buys afterwards And in that way he may make losses or he may make profits If he makes losses the losses cannot be said to be the results of the individual acts

They are the results of the trade as a whole Test it in this way A person may organise an effort to find things He may start a salvage or exploring undertaking and he may make profits The profits are not the profits of the findings they are the profits of the adventure as a whole Test it in this way He may make a loss You cannot say that the loss was due to the failure to find The loss is due to the trade That tests it very well because it shows the difference between the trade as an organism and the individual acts

So much is clear I think about the cases of making a trade or a vocation or an adventure of obtaining differences in prices or obtaining things which are the subject of finding The trade or vocation which has to do with differences in prices may be popularly spoken of as gambling there is no intention really to accept or deliver the article But they are operations in relation to the differences of prices of commodities and there is an element of fecundity in those and indeed those operations form the subject of a great deal of trade

Now we come to betting pure and simple (I do not mean to say that mercantile bargains are tainted with the element of gambling) It has been settled that a book maker carries on a taxable vocation What is the book maker s system? He knows that there are a great many people who are willing to back horses and that they will back horses with anybody who holds himself out to give reasonable odds as a book maker By calculating the odds in the case of various horses over a long period of time and quoting them so that on the whole the aggregate odds if I may use the expression are in his favour he makes a profit That seems to me to be organising an effort in the same way that a person organises an effort if he sets out to buy himself things with a view to securing a profit by the difference in what I may call their capital value in individual cases

Now we come to the other side the man who bets with the book maker and that is this case These are mere bets Each time he puts on his money at whatever may be the starting price I do not think he could be said to organise his effort in the same way as a book maker organises his I do not think the subject matter from his point of view is susceptible of it In effect all he is doing is just what a man does who is a skilful player at cards who plays every day He plays to day and he plays to morrow and he plays the next day and he is skilful on each of the three days more skilful on the whole than the people with whom he plays and he wins But I do not think that you can find in his case any conception arising in which his individual operations can be said to be merged in the way that particular operations are merged in the conception of a trade I think all you can say of that man in the fair use of the English language is that he is addicted to betting It is extremely difficult to express but it seems to me that people would say he is addicted to betting and could not say that his vocation is betting The subject is involved in great difficulties of language which I think represents great difficulty of thought There is no tax on a habit I do not think 'habitual' or even 'systematic' fully describes what

is essential in the phrase 'trade, adventure, profession or vocation' All I can say is that in my judgment the income which this gentleman succeeded in making is not profits or gains "

Isolated transactions—Profits from—

Per *Walsh and Ryves, JJ*—"The question is whether that sum is a receipt not arising from business or the exercise of a profession vocation or occupation which was of a casual and non recurring nature In our view the passage beginning with the word 'not' and ending with the word 'occupation is an exception upon an exception that is to say, the word 'which' relates only to receipts which are not receipts arising from business or the exercise of a profession, vocation or occupation If the argument on behalf of the assessee were adopted, the result would be to strike out that qualifying passage from the section and to make all receipts whether arising from business or not which are of a casual and non recurring nature within the exemption We therefore hold that a receipt arising from business or the exercise of a profession vocation or occupation does not come within the exception

The next question is whether this was a receipt arising from business or the exercise of an occupation The particular transaction is certainly one of the business of a broker, and it comes within the definition of business The definition of the word 'business' as used in section 2 sub section (4) places the matter beyond doubt The word 'business' is there defined as including any adventure, and it is not possible to exclude from the expression 'adventure' indeed, successful adventure the negotiation of a sale of a large mill which resulted in a commission payable to the value of Rs 75 000

'In our view his transaction although an isolated transaction, was not of a casual or non recurring nature To some extent the discussion of this question overlaps the question whether a particular receipt is a receipt arising from business or the exercise of a vocation In taking the view we do we found ourselves mainly upon the use of the word 'nature in the exemption The word is not 'occurrence' If the language were a casual or non recurring occurrence' there would be much to be said for the contention of the assessee But the expression 'nature' appears to us to be a word used independently of the accident of the event happening in fact once only or more often in a fortunate year It connotes a class of dealing which might occur only once but which might occur several times Now the adventure of a business-man who is enabled through his business associations to negotiate a large transaction and thereby to earn a heavy commission, may undoubtedly be in fact non recurring in the sense that so successful an adventure would not be likely to occur again But on the other hand, it is a class of transaction which might occur to any such businessman once only or half a dozen times again, during the course of the year The Government Advocate put what may be said to be a decisive illustration of the true meaning of the word 'nature' when he pointed out that if you sold your own house at a profit, although the question would also arise as to

whether the result of that transaction was a profit at all but rather only enhanced capital it would in any discussion as to whether it was brought within this exemption undoubtedly be a transaction of a non recurring nature You could not do it twice But if on the other hand you engaged in a solitary transaction of bringing two of your friends together and negotiated the sale of the house of one of them to the other and thereby earned a commission you would in our opinion be carrying out a transaction which although casual in fact would not be of a non recurring nature because having done so one with success you might be asked by some vendor to do it again Our answer therefore is that the particular profit in question was not of a casual and non recurring nature within the meaning of the section [27 28]

The assessee, a banker and money lender, remitted from Madras sums aggregating over 4 lakhs of rupees to Penang, such sums being invested there in Straits Settlements dollars, and ultimately reconverted into rupees and remitted back to Madras The remittances were made on eight occasions within a period of four months in 1919 and the retransfer to Madras was on thirteen occasions covering a period of four months from the end of 1920 to the beginning of 1921 Owing to the fluctuations in exchange which varied between 83 and 175 rupees per hundred dollars the assessee made a profit of a considerable amount on the transaction He was assessed to income tax on that profit

Per *Sir Walter Schwabe C.J* (*Coutts Trotter J* concurring) — The questions which have arisen for decision have been whether particular transactions form part of a business carried on by the assessee They need not be part of some already established business but they must together form a business If the transactions form part of the ordinary business of the assessee the profits or losses on them must of course be brought into account But where the transactions are outside the scope of the ordinary business of the assessee it is often a difficult question to decide whether or not they are to be treated as subject to income tax Profits may be made by the realisation of security or by the sale of land or moveable property and in the case of one man they may be merely successful realisations of assets or alterations of investments while in the case of another man they may form part of the income of a business To give a simple illustration a Barrister might buy a picture and at a later date when the works of that particular artist were in demand sell that picture and realise a profit No income tax would be payable on this profit If a picture dealer bought a picture and on the same events happening sold it at a profit that profit would be a profit earned in his business and would be liable to income tax So too profits made on an isolated speculation are not liable to income tax but those made in speculation of a similar kind as a part of business would be liable A difficult question may however arise as to whether

(27 28) *In re* Chunni Lal Kalyan Das 1 I T C 419

the transactions are of such frequency as to amount to carrying on a business The distribution is well illustrated by the cases of *California Copper Syndicate Company Limited v Harris*[29], *Hudson's Bay Co v Stevens*[30] (Reference was also made to *Commissioners of Taxes v Melbourne Trust Company*[31], *Beynon & Co v Ogg*[32])

"Turning to the facts of the case, the assessee was a dealer in money and had by reason of his dealings with the Straits Settlements, facilities at hand for dealings in exchange between Madras and the Straits Settlements He had at Penang agents themselves bankers who were in the habit of collecting for him outstandings in his money lending business and as and when required remitting them to India and in the process converting dollars into rupees During the periods in question in this case he got regular information by letter and cable from these agents as to the movements of exchange in the Straits Settlements He sent large sums of money extending over a period of four months At first the market went against him, and he sent increasing quantities of rupees no doubt with a view to averaging the cost of the dollars The dollars were by arrangement with the agents left on deposit carrying interest a fact not in itself conclusive and when he got them back by reason of the increase in the value of the rupee, he was able to realise by degree an increasing profit Taking all these facts into consideration I think that the right inference to be drawn is that in this case those dealings in exchange had become part of the assessee's banking business and I think too that even looked at apart from his ordinary business he did not enter into these transactions as an isolated investment of capital or speculation but as a business of a dealer in exchange "[33]

The assessee consented to be appointed under a power of attorney to dispose of cotton bales for and on behalf of a firm that had got into difficulties to pay what was due to several Muradams and Banks, and after deducting from the net sale proceeds of the cotton bales all his costs, charges and expenses in respect thereof and his remuneration, to distribute the balance amongst the several persons and firms whose names had already been submitted by the firm to the assessee Under that power-of-attorney the assessee sold over 100,000 bales which realized about Rs 1,63,00,000 and received his remuneration Rs 1,88,750 The assessee claimed exemption for this sum under section 4 (3) (*vii*) of the Income tax Act

Per *Macleod C J*—" It has been argued for the assessee that these receipts did not arise from business, that 'business' connotes continuity and that only the receipts arising from a business

(29) 5 Tax Cases 159
(30) 5 Tax Cases 424
(31) (1914) A C 1001
(32) 7 Tax Cases 125
(33) *Board of Revenue v Arunachalam Chettiar*, 1 I T C 238

which is carried on continuously can be assessed But the section refers to receipts arising from business and not to receipts arising from a business ' The definition of business in section 2 (4) is as follows — "Business includes any trade commerce or manufacture or any adventure or concern in the nature of trade commerce or manufacture and consequently it is not necessary that the receipts should arise from a business continuously carried on during the year to make them liable to assessment Even if they arise from a single adventure in business they would be liable to be taxed

' Now it seems clear that the profession or occupation of the assessee being that of a cotton merchant any receipts arising from the buying and selling of cotton would be considered as arising from trade or commerce and the argument that receipts from an extraordinary transaction connected with business such as the one in this case which has only occurred owing to exceptional circumstances and which would not be likely to occur again for many years can be placed in the same category as receipts entirely disconnected with business or the profession or vocation or occupation of the assessee which might be considered of a casual and non recurring nature, cannot be accepted

We are clearly of opinion therefore that the remuneration earned by the assessee must be considered as receipts arising from business and therefore liable to taxation [34]

Three individuals—members of firms in the wine trade—formed themselves into a syndicate by oral agreement and purchased as a speculation—and apart from their firms—a large quantity of brandy from the Cape Government in a single transaction The bulk of the brandy was shipped to England where it was sold, after blending, by the firms to which the three individuals belonged acting on behalf of the syndicate *Held*, that there was evidence on which the Commissioners could find that there was a trade

It is quite clear that these gentlemen did far more than simply buy an article which they thought was going cheap and resell it They bought it with a view to transport it with a view to modify its character by skilful manipulation by blending with a view to alter not only the amounts by which it could be sold as a man might split up an estate but by altering the character in the way it was done up so that it could be sold in smaller quantities They employed experts—and were experts themselves—to dispose of it over a long period of time When I say over a long period of time I mean by sales which began at once but which extended over some period of time They did not buy it and put it away they never intended to buy it and put it away and keep it They bought it to turn over at once obviously and to turn over advantageously by means of the operations which I have indicated Now under those circumstances the Commissioners have held that they did carry on a

(34) Sir Purshottamdas Thakurdas v Commissioner of Income tax Bombay 2 ITC 8

trade, and I think it is a question of fact, and I do not think his telling me all the evidence that the Commissioners can make me or indeed give me authority—because they cannot give me authority if I do not possess it by law—to determine the question of fact ' [35]

A wholesale agricultural machinery merchant who had never dealt in linen, bought the war surplus stock of aeroplane linen as a single transaction and made large profits in selling it It was contended on his behalf that it was an isolated transaction not constituting a 'trade' *Held* that it was 'trade'

Per *Roulatt J*—"Now he only made one purchase but that does not prevent the subject matter being a trade (then refers to the *California Copper Case*[36] the *Cape Brandy Syndicate Case*[37] and *Beynon v Ogg*[38]) He bought this gigantic consignment of linen and he set to work to make people come in and buy it to induce them he set to work and worked away at it and got offices did this that and the other and they bought it all and all this is profit Why is not that a 'trade'? '

Per *the M of R*—'The Appellant's contention was that he had one speculation in the nature of a gambling transaction, and had not carried on a trade or business for his own calling was that of a merchant engaged in the business of wholesale machinery a business which had no part in or affinity to the trade of linen We agree with the Commissioners and Mr Justice Rowlatt that this contention is untenable The appellant entered upon this separate new trade or business or adventure for the purpose of realising profits or gains in it and even if his purchase was made under a single contract the realisation of his profit which was large was accomplished by his setting up a trading organization If it was maintained only till the 45 000 000 yards was disposed of it was none the less characterised as a business while it was in being Whatever view may be taken by the Courts upon such a point it is a question of fact which it is for the Commissioners to determine They had abundant material upon which to reach the conclusion that they did It is not possible to lay down definite lines to mark out what is a business or a trade or adventure and to define the distinctive characteristics of each, nor is it necessary or wise to do so The facts in each case may be very different but it is the facts that establish the nature of the enterprise embarked upon "[39]

It was also argued on behalf of Mr Martin that the profits were not "annual", but the Court of Appeal confirmed the interpretation of that word as given by Rowlatt, J in *Ryall v Hoare*[40] Subject to certain reservations as regards the meaning

(35) Per *Roulatt J* in *Cape Brandy Syndicate v Commissioners of Inland Revenue* [upheld by Court of Appeal (1921) 2 K B 403 (C A)]
(36) 5 Tax Cases 159
(37) (1921) 2 K B 403 C A
(38) 7 Tax Cases 125
(39) *Martin v Lowry* 11 Tax Cases 297
(40) 8 Tax Cases 521

of the word "annual" (This point, however, does not affect the position in India, as in the law here the word "annual" is not used The only use thereof is in the executive instructions in para. 21 of the Income tax Manual) the House of Lords confirmed the judgments of the Lower Courts

A ship repairer, a blacksmith and a fish merchant's employee, with no previous business association with each other, jointly bought a cargo steamer with a view to its alteration and sale They altered it into a steam drifter and sold it at a profit *Held,* that the purchase and sale was "an adventure in the nature of trade" and not a casual transaction

Per *Lord Sands*—' Having a picture cleaned or a ship's boilers cleaned and the hull repainted (is not trade) but purchasing a quantity of pig iron and having it manufactured into steel or of gold bearing ore and having the gold extracted by melting the ore (is trade) '

Per *L P Clyde*—"If the venture was one consisting simply in one isolated purchase of some article against an expected rise in price and a subsequent sale it might be impossible to say that the venture was 'in the nature of trade' the test is whether the operations are of the same kind and carried on in the same way as those which are characteristic of ordinary trading in the line of business in which the venture was made '[41]

The last three cases were reviewed in *Leeming v Jones,*[42] by Rowlatt, J, who showed that the test suggested by the Lord President in the *Livington Case* was the real test which covered all these three different types of cases, *viz* where an important and large asset is bought and sub divided and so made more marketable, and the sub division is advertised and so on (*Martin v Lowry*), where you get a thing altered and treated and dealt with in an expert way and also sub divided (*Cape Brandy Syndicate Case*), where you get a thing, though not altered or sub divided, yet so thoroughly repaired that it is converted into a new and better article (*Commissioners of Inland Revenue v Livington*) In all these cases the isolated transactions constituted trade because the "operations are of the same kind as those which are characteristic of ordinary trading in the line of business in which the venture was made" (Per Lord President Clyde in the *Livingston Case*)

"A single plunge may be enough, provided it is shown to the satisfaction of the Court that the plunge is made in the waters of trade, but the sale of a piece of property—if that is all that is involved in the plunge—may easily fall short of anything in the nature of trade Transactions of sale are characteristic of trade but they are not nece

(41) *Commissioners of Inland Revenue v Livingston Florence and Keith* 11 Tax Cases 538

(42) 7 A T C 220

sarily distinctive of it "—Per *L P Clyde* in *Balgownie Land Trust Ltd* v *Commissioners of Inland Revenue*[43]

"If it is desired to tax the difference between what a man has bought goods for or property for and sold them for you can tax it only if you can say that what he did was a trade or adventure or concern in the nature of trade "—*per* Rowlatt J in *Pearn* v *Miller*[44]

The assessees who were stone, marble and granite merchants in England, made a contract with a firm for the supply to them of marble, and contemplated acquiring some of this marble in Italy In order to facilitate their purchase of this marble later on, they bought Italian lire at once The lire rose in value, and the assessees brought the money back in sterling, and the lire fell in value and the assessees converted the money again into lire *Held,* that the profits on the lire were not taxable

'I do not think it has anything to do with the profit of the contract itself (that of the supply of marble) It was a mere appreciation of something which they had got in hand "—Per *Rowlatt J* in *McKinlay* v *Jenkins & Sons, Ltd*[45]

In this case it was found as a fact by the Commissioners that it was no part of the company's business to speculate in the exchanges

The assessee who was a money lender and had been connected with the film business and also been a dealer in real property, purchased, while on a visit to Germany, a large quantity of toilet paper at cheap rates from a bankrupt German firm, and sold it gradually through an agent in London and made a heavy profit *Held,* that it was trade "The appellant was himself liable for the purchase of this vast quantity of toilet paper, for no individual or personal purpose of his own but plainly and manifestly (for the purpose of) reselling it at a profit The element of adventure accordingly entered into it from the first "—Per L P Clyde[46]

Grant from Unemployment Grants Committee—

In *Seaham Harbour Dock Co* v *Crook,*[47] it was held that a grant from a Government body to assist in carrying out certain works with a view to reduce unemployment was received, in the course of business on Revenue account, even though at the time of the grant, there was no trading The grant was a subsidy in the nature of income and not of capital, and was given at half the

(43) *14 Tax Cases 684*
(44) 11 Tax Cases 610
(45) 5 A T C 317
(46) *Rutledge & Sons* v *Commissioners of Inland Revenue* 8 A T C 207
(47) 9 A T C 175

rate of interest—subject to a limit on the cost of certain approved works

Clergymen—Voluntary gifts—From Congregation—

A gift of money, raised by voluntary subscription, and made annually to a minister of religion by his congregation, was held to be assessable

Per *the Lord Ordinary*—"It is true that it is a voluntary contribution by the parishioners one which they are under no obligation to make and which they may withdraw at any time But still it is a payment made to the appellant as their clergyman and it is received by the appellant in respect of the discharge of his duties of that office "[48]

In a case in which the Queen Victoria Clergy Sustentation Fund made grants to a Clergyman in augmentation of the income of his benefice, it was held that the grants were assessable on the Clergyman as profits accruing to him by reason of his office In this case the court considered the precise form of the application for the grant and of the resolution authorizing the grant The decision was given in favour of the Crown on the ground that (1) no enquiry was made as to the *personal* means of the incumbent but only as to the income of the *benefice*, it being left to the incumbent to ask for the grant if he needed it and (2) if the benefice was vacant, the grant was divided between the outgoing and incoming incumbents It followed therefore that the income accrued by reason of the office *Turner* v *Cuxson*[49] was distinguished on the ground that the grant in that case was as a *personal* gift of an eleemosynary character, and the principle underlying the decision in *In re Strong* was approved

Per *Collins M R*— Now that judgment (the *Strong case*) is certainly an affirmation of a principle of law that a payment may be liable to income tax although it is voluntary on the part of the persons who made it and that the test is whether from the standpoint of the person who receives it it accrues to him in virtue of his office That seems to me to be the test and the liability to income tax is not negatived merely by reason of the fact that there was no legal obligation on the part of the persons who contributed the money to pay it "[50]

Clergymen—Annual grant to—From religious society—

A curate received from a religious society a grant renewable annually at discretion on certain conditions The grant was in recognition of faithful service as a clergyman, but not in

(48) In re *the Rev George Walter Strong* 1 Tax Cases 207
(49) 2 Tax Cases 422
(50) *Rev G N Herbert* v *J A McQuade* 4 Tax Cases 489

respect of the particular curacy the clergyman held *Held*, that it was not assessable to income tax [1]

Per *Coleridge C J*—"Now here the payment is made, not for services in the parish at all not by the persons whom he serves and not in respect of the particular services which he renders—but it is an honorarium paid by a society to a deserving man because he has done his duty well "[2]

In *Hue v Miller*[3] the Crown which sought to assess a small grant of £15 made by a sustentation fund, gave up its claim

Clergyman—Grants to—From congregation—

In a case in which the grants were to cease on the Minister's death or his resignation of the pulpit, *i e*, the grant was given on quasi personal grounds, it was nevertheless held that the grants were assessable to income tax, having regard to the facts of the case, *viz* —(*a*) the ability of the congregation to make adequate provision for their minister, (*b*) the fact that the minister had been regularly educated for that vocation, (*c*) the amount of his income [4]

Clergyman—Easter offerings—From congregation—

A portion of a collection made in Church was given by way of 'Easter offerings' to an incumbent by reason of his office, but the gift would not have been made had not the recipient, besides being the incumbent, been also poor *Held*, that the offerings were not given as an additional remuneration for services, but on account of personal poverty, and that, in these circumstances, they were not assessable to income tax [5]

The correctness of this decision was however doubted in *Cooper v Blakiston* [6] See per Lord Alverstone, C J, in the Court of Appeal (upheld by the House of Lords)

'There are findings which have made me doubt whether the decision was exactly a strict application of the principle but, looking at the case I think it was a decision upon the particular facts of that case "

"Easter Offerings" were given to a Vicar by parishioners and others in response to an appeal made by the Bishop and supported by the Churchwardens The offerings were mainly received through collections in Church, the residue consisting of

(1) *In re* Strong 1 Tax Cases 207, distinguished
(2) *Turner v Curzon* 2 Tax Cases 422
(3) Q B D 1900
(4) *Poynting v Faulkner* 5 Tax Cases 145 (C of A)
(5) *Turton v Cooper*, 5 Tax Cases 138
(6) 5 Tax Cases 347

sums sent to the Churchwardens or directly to the Vicar. *Held*, by the House of Lords that the Offerings were assessable to income tax

Per *Buckley, L J*—"The question is not what was the motive of the payment, but what was the character in which the recipient received it Was it received by him by reason of his office?"

Per *the Lord Chancellor*—"In my opinion, where a sum of money is given to an Incumbent substantially in respect of his services as Incumbent, it accrues to him by reason of his office Here the sum of money was given in respect of those services Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose as to provide for a holiday or a subscription peculiarly due to the personal qualities of the particular clergyman it might not have been a voluntary payment for services but a mere present

"In this case however, there was a continuity of annual payments apart from any special occasion or purpose, and the ground of the call for subscriptions was one common to all clergymen with insufficient stipends, urged by the Bishop on behalf of all alike What you choose to call it matters little The point is, what was it in reality?

"It was natural, and in no way wrong that all concerned should make this gift appear as like a mere present as they could But they acted straightforwardly as one would expect and the real character of what was done appears clearly enough from the papers in which contributions were solicited "[7]

Liquidation—Honorarium—Secretary without remuneration—

The *assessee acted as* Secretary of a Company without remuneration from the date of its incorporation until his appointment as Liquidator of the Company When the liquidation of the Company was completed, there was a sum in hand, after discharge of all liabilities, which according to the Company's Memorandum of Association was divisible amongst the ordinary shareholders of the Company By a unanimous resolution, these shareholders voted the sum in question, *in equal shares to the* Chairman of the Company, and to the assessee The assessee contended that this payment was a voluntary gift, and that the whole of his duties as Secretary and Liquidator had terminated before the gift was made *Held*, by the Court of Appeal, that the sum voted by the shareholders of the Company to the assessee did not accrue to him in respect of an office or employment of profit and that, therefore, he was not chargeable to income tax in respect of the sum in question

Per *M R Sterndale*— The argument was rather narrowed to this, that a voluntary payment cannot be a *profit of the office after the office*

(7) *Cooper* v *Blakiston* 5 Tax Cas s 347

has terminated unless that office had been an office of profit beforehand Now I cannot accept that as a broad proposition It seems to me that there may very well be a payment in respect of an office which had been gratuitous up to its end but which still might be payment for the services of that office and therefore be a profit accruing by reason of the office I do not think that a hard and fast line can be drawn In *Duncan's Trustees v Farmer*[8] Lord Dunedin says 'My Lords I confess I have never been able to see how it could possibly be said to be in respect of his office when the whole reason it was given to him was that he was no longer in the office' At first sight that may seem to bear out the proposition that was contended for I do not think that it does because it will be seen that the noble Lord was speaking of the facts of that case an annuity was granted to a Minister of the Church on retirement through ill health and therefore it was given to him as a sort of compassionate allowance and could not be obtained except when he had resigned his cure Therefore I do not think that proposition can be maintained But the fact that the office is at an end is a fact of very very great weight and when you add to that that the payment is made not by the employer because it was not made and could not be made here by the Company which was the employer but by other persons—in this case it was the shareholders individually—the facts still more point to it not being a payment for services or a profit accruing by reason of the office To my mind that points to something in the nature that is spoken of by Lord Loreburn in *Cooper v Blackiston*[9] 'In my opinion where a sum of money is given to an incumbent substantially in respect of his services as incumbent it accrues to him by reason of his office Here the sum of money was given in respect of these services Had it been a gift of an exceptional kind such as a testimonial or a contribution for a specific purpose as to provide for holiday or a subscription peculiarly due to the personal qualities of the particular clergyman it might not have been a voluntary payment for services but a mere present'"[10]

Bonus—Commission—Addition to fixed salary—

The appellant, whose remuneration as general manager of a limited company consisted partly of a fixed annual salary and partly of a commission or bonus on the company's net profits had been assessed to Income tax on the basis of the total amount of salary and commission or bonus received or receivable by him from the company in respect of each of those years *Held* by the House of Lords that the commission or bonus on net profits fell within the definition of the expression "perquisites", and was properly assessable[11]

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(8) 5 Tax Cases 417
(9) 5 Tax Cases 347
(10) *Cowan v Seymour* 7 Tax Cases 372
(11) *M Donald v Shand* 8 Tax Cases 420

The Chairman of a *company was voted along with* other directors a bonus in addition to his ordinary remuneration *Held,* setting aside the decision of the Commissioners, that the bonus was taxable, as it arose from the assessee's office [19]

Overdrafts—Guarantee of—Commission for—

The bankers of a company refused to allow its overdraft to be increased except upon the joint and several personal guarantee of its directors, of whom the assessees were two In consideration of such guarantee, the company granted to each of the directors a commission of two per cent of the whole amount guaranteed The original guarantee was for one year only, but, similar circumstances arising in the following year, the directors renewed their guarantee (for a still greater amount) for a further year, and were granted commission thereon at the same rate as before The assessees contended that the commissions arose from casual, unsought and exceptional transactions and were not chargeable to Income tax *Held,* that the commissions were annual profits or gains within the meaning of Case VI of *Schedule D, and had been properly assessed to Income tax* thereunder

Per *Roulatt J*— It was not in the line of business of either of them to give a guarantee and one of them at any rate who is a solicitor had never done it before and probably will never do it again they did it unwillingly it seems to me that on the view of the facts taken by the Special Commissioners by which of course I am bound I must treat this case as just on the same footing as if a person not connected with business at all received a commission from another person also not connected with business for doing him *the favour of guaranteeing his account at a bank* "Profits or gains' mean something which is in the nature of interest or fruit as opposed to principal or tree A person may have an emolument by reason of a gift *inter vivos* or testamentary or he may acquire on emolument by finding an article of value or money or he may acquire it by *winning a bet It seems to me* that all that class of cases must be ruled out because they are not profits or gains at all Without pretending to give an exhaustive definition I think one may take it as clear that where an emolument is received or rather where an emolument accrues by virtue of some service rendered by way of action or permission or both at any rate that is included within the words profits or gains Now what is the meaning of the word 'annual ? It may mean and perhaps its most obvious meaning is annually recurring like the seasons or if not recurring in perpetuity like the seasons as a matter of nature annually recurring in the ordinary way for a considerable space of time or it may conceivably mean lasting only for a year ' as you speak of an annual plant but I do not think that is really

(19) *Radcliffe* v *Holt* 11 Tax Cases 621

a very true meaning of the word "annual," because I think when you speak of an annual plant what is in your mind is the necessity of annual sowing, the plant is not annual, it is the sowing that is annual At any rate, that is a possible meaning of the word "annual" Thirdly, it might mean "calculated with reference to a year", that is, like interest of so much per annum If there is anything in the suggestion that "annual" means or includes "lasting for a year," I must point out that this guarantee did last for a year, and it was renewed for another year, but there is nothing in that, because it was renewed *de novo* and did not run on, it was a transaction for a year twice repeated Those are three possible meanings of the word "annual," but I do not think any of them is applicable in this particular case dealing with Income tax One is not left entirely without guidance, at any rate as a matter of practice Take the case of letting a furnished house It is inveterate now that the letting of a furnished house for a few weeks in one year, will attract Income tax, under this case, upon the profit made by the letting That is the inveterate practice, and although it has never been ruled upon, in principle, by the Courts it has been tacitly assumed by the Courts in Scotland, and it seems to me out of question that a Court of First Instance, at any rate, could possibly say that that is wrong Now, that is not recurring yearly, and it does not last for a year, and it is not calculated with reference to a year because it is calculated with reference to the amenities of a few particular weeks Again, take the case of a person who is appointed to perform some services, which might possibly be by way of an office, a person appointed, not carrying on any trade or any business, but who happens to be appointed—as a retired Judge was appointed some years *ago to hold a very important arbitration in connection* with the London water—appointed with a lump sum remuneration to do a particular piece of work, or, to take a humbler instance, which is more familiar perhaps to us here, the case of a Judge's Marshal, who gets a little appointment for a week or two, he suffers a deduction of income tax when his modest emolument is paid to him Now, recognizing that position, it seems to me that 'annual' here can only mean 'in any year,' and that the 'annual profits or gains' means 'profits or gains in any year as the succession of the years comes round' That being the position in which I think I am, this litigation seems to me to raise the whole question of casual profits I have already referred to the furnished house illustration Now, a man may carry on no business and no profession, he may not be a journalist, he may not be an author, but he may be called upon to write an article for a paper for reward He may find that there would be a demand for a single book from his pen, as a traveller, a soldier, a sailor or a statesman, or what not Now, it seems to me that all cases of that kind, like this case of these gentlemen who gave this guarantee, are instances of casual profits which cannot in any way be distinguished from the profit which is obtained by a man who lets his house furnished "[13]

(13) *Ryall v Hoare and Honeywill*, 8 Tax Cases 521

Compensation for loss of office—Whether profits from office—

A firm of ship managers were *employed as such by a* steamship company and remunerated by a percentage of the company's annual net profits The company went into voluntary liquidation and transferred £50,000 of 5 per cent bonds to the firm as 'compensation for loss of office' *Held,* that on the findings of the Commissioners as to the nature of the payment, which there was evidence to support, the said sum was not a 'profit' liable to income tax

Per *Rowlatt, J*—' I think everybody is agreed that in cases of this kind the circumstance that the payment in question is a voluntary one does not matter You must not look at the point of *view of the person who pays and see whether he is compellable to pay* or not, you have to look at the point of view of the person who receives, to see whether he receives it in respect of his services or in *respect of trade If it was a payment in respect of the termi*nation of their employment I do not think that is taxable as profit A payment to make up for the cessation for the *future of annual taxable profits is not itself an annual profit at all*

I should not have thought that either damages for wrongful dismissal or a payment in lieu of notice at any rate if it was for a longish period—I will not say a payment in lieu of notice I will say a voluntary payment in respect of breaking an agreement which had some time to run—would be taxable profits But at any rate it does seem to me that compensation for loss of an employment which need not continue but which was likely to continue is not an annual profit within the scope of the income tax at all ' [14]

In *Turner Morrison & Co, Ltd* v *Commissioner of Income tax, Bengal*[15], it was held that compensation received by the company for the loss of one of the managing agencies carried on by the company was income assessable under section 12 not being exempt under section 4 (3) *(vii)* The same High Court observed in the case of *Mundy* v *Commissioner of Income tax, Assam,*[15a] that the decision in *Turner Morrison's Case* must be understood with special reference to the facts of that case

In *Rutherford's case*[15b] it was held by the Patna High Court that a commuted pension paid in lump to an employee is not exempt under this clause because, even though casual and non recurring, the payment arises from an office or profession

(14) *Cibbett* v *Joseph Robinson & Sons* and *Commissioners of Inland Revenue* v *Joseph Robinson & Sons* 9 Tax Cases 48

(15) 3 I T C 214

(15a) Unreported

(15b) Unreported

Commission—Casual—Addition to salary—

An Incorporated Accountant who was Secretary and Director of a Company received a salary as such He negotiated a sale of a branch of the company's business, and received £1,000 as commission for his services in negotiating the sale *Held*, that the £1,000 was part of the profits from his office

Per *Rowlatt J* — If an officer is willing to do something outside the duties of his office to do more than he is called upon to do by the letter of his bond and his employer gives him something in that respect that is a profit it becomes a part of his office which is enlarged a little so as to receive it [16]

Addition to salary—Inspection fees—To Director—

The appellant was the chairman of a British Company In addition to his ordinary fees, he was allowed a certain remuneration for inspecting the company's agencies in China and negotiating with the Chinese Government *Held*, that the additional remuneration was part of the appellant's profits as chairman, notwithstanding its being given for work done abroad

Per *Rowlatt J* — There appears to be no power for a Director to divide himself into two and to be a Director in China as well as a Director in England so as to be capable of being regarded as filling two severable capacities [17]

Casual profits—Rope manufacturer—Under-writing oil shares—Profits from—

The assessee, whose ordinary business was that of a rope manufacturer, underwrote 15,000 shares in an Oil Company for which he received a commission It was contended on his behalf that the profits arose from an isolated transaction and were therefore of the nature of capital receipts following *Ryall* v *Hoare*,[18] that the profits were taxable *Held*, by Rowlatt, J, [19]

Professional cricketer—Benefit match—Receipts from—

The assessee was a professional cricketer A match was played for his benefit, and, in accordance with the rules of the club which employed him, the net proceeds of the match and certain other sums obtained by public subscription were invested in the name of the trustees of the club After a few years the investments were realised, and the proceeds made over to the assessee who, with the consent of the club, bought a farm It was admitted by the Crown that the receipts from public subscriptions were not taxable but that the gate money was, on the

(16) *Mudd* v *Collins* 9 Tax Cases 297
(17) *Barson* v *Airey* 5 A T C 65 (C of A)
(18) 8 Tax Cases 521
(19) *Lyons* v *Cowcher*, 5 A T C 226

ground that it was a perquisite of his employment as a professional cricketer It was held by Rowlatt J, that the gate money was not taxable The *ratio decidendi* was that such receipts come to a man only once in a lifetime, and were really of the nature of an endowment, that there was really no difference between the gate money and the other public subscriptions, and that the assessee had no control over the money except with the consent of the club This decision was reversed by the Court of Appeal (Sargent, L J, dissenting), but the House of Lords restored Rowlatt, J's judgment (Lord Atkinson dissenting).[20]

In *Davies v Harrison*[21], in which a professional footballer was given a benefit on transfer from one club to another, it was held that the benefit was liable to tax, the case being distinguished from *Reed v Seymour*[20] on the ground that, having regard to the rules of the clubs and the league controlling the clubs, the benefit was really a business arrangement, being a pre arranged reward for service and not a voluntary gift or compensation for loss of employment

In *Wing v O'Connell*[22] it was held by the Irish Supreme Court, (Murnaghan, J, dissenting) reversing the decision of the High Court that the presents received by a jockey from the owners for whom he rode were taxable even though the presents were given voluntarily and after the employment had ceased

A mere gift is not a profit or gain at all, the fact that it recurs will not make it a profit or gain *Held,* accordingly in a case in which a Company voted recurring payments (of which after payment of two instalments the payment was stopped) practically amounting to pension to their ex Managing Director, who became an ordinary Director and hardly attended any meeting because of his ill health, he having no claim to such payments though the Company had often made such payments to its employees, and the Revenue had disallowed such deductions in computing the company's profits—that the Commissioners were right in treating the two payments as pure gifts and therefore not taxable in the hands of the recipient[23]

Saltpetre—Extraction of—Royalty from—

In a case in which the assessee allowed his tenants to extract earth containing saltpetre it was argued that (1) the income was casual and non recurring, and (2) that the income arose from the sale of the earth and was therefore a capital receipt

(20) *Reed v Seymour* 11 Tax Cases 6?5
(21) 6 A T C 536
(22) 19?7 I R 84
(23) *Beynon v Thorpe,* 7 A T C 191, 14 Tax Cases 1

As to (1) the Commissioner found as a fact that the receipts were recurring and the High Court accepted the finding as there was evidence for it As to (2)—

'It is quite impossible to distinguish the rents or royalties whatever they may be called arising from this source, from the rent or royalties arising from the letting of coal or other minerals in the earth or income which arises from the produce of the earth, whether it be on the surface or whether it be beneath the surface, provided that it is not non recurring or casual and provided that it is not in the nature of a sale —*Per* Dawson Miller, C J in *Maharajal Guru, etc Sahi v Commissioner of Income tax*'[24]

Bricklands—Income from—

Income from letting out land for the manufacture of bricks is not a capital receipt from the sale of the soil once for all It is a recurring receipt under 'other sources'[25]

(*viii*) Agricultural income

See notes under section 2 (1).

(*ix*) *Any income received by trustees on behalf of a recognised provident fund as defined in clause (a) of section 58-A*

History—

This clause was introduced by Act XII of 1929

See section 58 A The funds referred to are not governed by the Provident Funds Act, 1925 Funds governed by that Act are exempt from tax on their investments by virtue of clause (iv) of this sub section

Exemptions generally—United Kingdom Law—

Under the English Acts, there is no provision corresponding to section 60 of the Indian Act giving power to the executive to grant exemptions, and whatever provisions there may be for exemptions are in the Acts themselves The notes under the foregoing sub sections of this section have referred to the corresponding provisions under the English law under each head But there are certain exemptions under the English law which have no counterparts here These are the exemption of Friendly Societies, Savings Banks, Trade Unions, Industrial and Provident Societies (corresponding to Co operative Societies here—but the English Societies enjoy greater concessions than those given to Co operative Societies in India under section 60), National Insurance Funds, Unemployment Schemes, and Super

(24) I.L.R 6 Pat 29 2 I T C 281
(25) *Maharani of Bettiah v Commissioner of Income tax, B & O* (Unreported)

annuation Funds (about this however see notes under section 10) All exemptions in the United Kingdom have to be claimed from the Special Commissioners who are an official body —see notes under section 5

CHAPTER II

Income-tax Authorities

Income tax authorities

5 (1) There shall be the following classes of Income-tax authorities for the purposes of this Act, namely —

(*a*) The Central Board of Revenue,

(*b*) Commissioners of Income-tax,

(*c*) Assistant Commissioners of Income-tax, and

(*d*) Income-tax Officers

* * *26

(3) There shall be a Commissioner of Income-tax for each province who shall be appointed by the Governor-General in Council

(4) Assistant Commissioners of Income-tax and Income tax Officers shall, subject to the control of the Governor-General in Council, be appointed by the Commissioner of Income-tax by order in writing They shall perform their functions in respect of such classes of persons and such classes of income and in respect of such areas as the Commissioner of Income-tax may direct The Commissioner may by general or special order in writing, direct that the powers conferred on the Income-tax Officer and the Assistant Commissioner by or under this Act shall, in respect of any specified case or class of cases, be exercised by the Assistant Commissioner and the Commissioner, respectively, and, for the purposes of any case in respect of which such order applies references in this Act or in any rules made hereunder to the Income-tax Officer and the Assistant Commissioner shall be deemed

(26) Repealed by the Central Board of Revenue Act 1924 (IV of 1924)

to be references to the Assistant Commissioner and the Commissioner, respectively

(5) The Central Board of Revenue may, by notification in the Gazette of India, appoint Commissioners of Income-tax Assistant Commissioners of Income-tax and Income-tax Officers to perform such functions in respect of such classes of persons or such classes of income and for such area, as may be specified in the notification, and thereupon the functions so specified shall cease, within the specified area, to be performed, in respect of the specified classes of persons or classes of income by the authorities appointed under sub-sections (3) and (4).

(6) Assistant Commissioners of Income-tax and Income-tax Officers appointed under sub-section (4) shall, for the purposes of this Act, be subordinate to the Commissioner of Income-tax appointed under sub-section (3) for the province in which they perform their functions

Income-tax Authorities—

(1) The Central Board of Revenue is appointed by the Governor General in Council Apart from its rule making powers under section 59, its specific powers are mentioned in the various sections, *e g*, sections 2 (6), 2 (11) (*b*), 5 (5), 18 (6), chapter IX A and section 64 The Board also issues executive instructions regarding the interpretation of the provisions of the Act and the rules, and is entrusted with the general administration of the Act Certain rules under chapter IX A in regard to "recognised provident funds" are made by the Governor General in Council

(2) The head of the Income tax Department of a province is the Commissioner of Income tax who is appointed by the Governor General in Council Till 1928, when the words "after consideration of any recommendation made by the Local Government in this behalf" were omitted from section 5 (3) by Act XVI of 1928, the appointment was made after consulting the Local Government The rest of the income tax staff in a province are subordinate to the Commissioner and are appointed and dismissed by him His power of appointment and dismissal of Assistant Commissioners and Income tax Officers is, under

section 5 (4), "subject to the control of the Governor General in Council" who exercises this control through the local Government under executive delegation

The specific powers conferred upon the Commissioner in regard to income tax proceedings are specified in sections 5, 28, 32, 33, 33 A, 35, 37, 54 (2) second proviso, 58 B, 58 D, 58 G, 58 J, 64 (3) and 66 of the Act In particular he is vested with power under section 33 to revise any orders passed by any income tax official, and he alone may, under section 66 of the Act, state cases for the opinion of a High Court

(3) The functions of Assistant Commissioners of Income tax are mainly appellate, but they also exercise supervision over the work of the Income tax Officers The particular powers conferred on them by the Act are set out in sections 23 A, 28 (1), 30 (2), 31, 35, 37, 38, 39, 42 (2), 50 and 53

(4) Income tax Officers are the assessors Section 64 of the Act specifies the particular Income tax Officers by whom assessments shall be made, *i e*, prescribes that assessments shall be made in the case of a business by the Income tax Officer of the area where the principal place of business is situated and in all other cases by the Income tax Officer of the area in which the assessee resides Sub section (4) of the same section provides that every Income tax Officer shall have all the powers conferred by or under the Act on an Income tax Officer in respect of any income, profits or gains accruing or arising or received within the area for which he is appointed This particular provision was inserted mainly in order to permit of enquiries being made into the profits of a branch business by the Income tax Officer of the place in which the branch is situated and in order to enable every Income tax Officer to make enquiries regarding all income, profits and gains arising or accruing within the area to which he is posted, even though the assessment in respect of *the particular income, profits or gains may not be made by him* Income tax Commissioners have therefore been directed to secure by issuing instructions or otherwise that there is no overlapping in this matter and that the same person is not assessed to income tax by more than one Income tax Officer but that all Income tax Officers should at the same time give the utmost assistance to the assessing Income tax Officer in regard to any property, income, profits or gains within their respective areas which are liable to assessment elsewhere

While the income tax staff will as a rule be appointed in provincial cadres, there are certain classes of cases for which it may be advisable that assessments should be made by an all-

India staff Such, for example, are the cases of military officers and of officers of other departments serving directly under the Government of India who are liable to transfer from one province to another, and there may be other cases such as the assessment of railway companies which at any time it may be considered advisable should be dealt with by a special officer for the whole of India Sub section (5) of this section has been inserted to make provision for the appointment of special officers in such cases

Allocation of work to Income-tax Officers and Assistant Commissioners—

It was ruled in the case of *Basantlal Nuthani* (Calcutta) that an order of the Commissioner directing an Income tax Officer to deal with cases "made over by me from time to time" was *ultra vires* of section 5 Jurisdiction should be conferred on Income tax Officers and Assistant Commissioners with reference to areas and classes of persons or income The word "classes" implies *some common pre determined feature in the persons or income* not depending on the Commissioner's volition from time to time

In the Darbhanga Raj case (unreported) it was ruled by the Patna High Court that the Assistant Commissioner when exercising the powers of the Income tax Officer need not actually go to the area of the Income tax Officer to exercise the functions

Transfer of cases—

There is no provision in the Act for the transfer of cases except as provided by section 5 (4) In respect of any specified case or class of cases, the Commissioner can direct that *the* Assistant Commissioner (*i e* having jurisdiction otherwise, not any Assistant Commissioner) shall perform the functions of the Income tax Officer and himself perform those of the Assistant Commissioner This provision was originally made in order to meet the transitional conditions during the transfer of the administration from a part time staff to a whole time one, but is also utilised to meet cases in which it is considered that the assessment should be made by a specially experienced officer and also to meet cases in which an Income tax Officer might on promotion have otherwise to sit in appeal over his own orders

The following schedule shows the notifications issued by the Central Board of Revenue under section 5 (5) and the officers appointed thereby to perform all the functions of an Income tax Officer, Assistant Commissioner of Income tax and Commissioner of Income tax in respect of specified persons —

SCHFDULE

*No and date of Noti fication	Serial No	Persons	Officer appointed to perform the functions of—		
			Income tax Officer	Assistant Commissioner of Income tax	Commissioner of Income tax
1	2	3	4	5	6
No 25—I T dated 23 6 28	1	All employees in the Posts and Telegraphs Depart ment under the audit of the two Deputy Accoun tants General Posts and Telegraphs (Postal and Telegraph Branches) Calcutta	Income tax Officer Rail ways and Miscellaneous Salaries Circle Calcutta	Assistant Commissioner of Income tax Calcutta	Commissioner of In ome tax Ben gal
	1 A	Government servants outside Bengal under the audit of the Pay and Accounts Officer Miscellaneous Central Departments and Survey of India Calcutta	Do	Do	Do
No 7—I T dated 18 2 28	2	Employees of the Bengal and North Western Railway	Income tax Officer Gorakhpur	Assistant Commissioner of Income tax Benares	Commissioner of Income tax Unit ed Provinces
	3	Persons excluding pensioners and persons employed in Army factories payable from Army estimates through the Controller of Military Accounts East ern Command Meerut and Lucknow districts Meerut	Income tax Officer Mili tary Circle Meerut	Assistant Commissioner of Income tax Meerut	Do
	4	Employees of the Assam Bengal Railway	Income tax Officer Chittagong	Assistant Commissioner of Income tax Dacca	Commissioner of Income tax Ben gal
(No 40—I T dated 29 9 28)	5	Employees of Messrs Ralli Brothers resident in Bengal or Bihar and Orissa	Income tax Officer Cal cutta District III A	Assistant Commissioner of Income tax Bengal (at Cal cutta)	Do

* Notifications referred to in brackets are amending notifications

*No. and date of Noti fication	Serial No.	Persons	Officer appointed to perform the functions of—		
			Income tax Officer	Assistant Commissioner of Income tax	Commissioner of Income tax
1	2	3	4	5	6
		Employees of the Imperial Tobacco Company, Ltd, and the Indian Leaf Tobacco Development Company residing in Bengal or Bihar and Orissa or Assam	Income-tax Officer Calcutta District III A	Assistant Commissioner of Income tax Bengal Calcutta	Commissioner of Income-tax Bengal
	7	Employees of the Bengal Nagpur Railway	Income-tax Officer Railways (and Miscellaneous) Salaries Circle Calcutta	Assistant Commissioner of Income tax Calcutta	Do
	8	Employees of the East Indian Railway except those of the Central India Coal fields Railway	Income tax Officer Railways and Miscellaneous Salaries Circle Calcutta	Assistant Commissioner of Income tax Calcutta	Do
(No 46—I T dated 17 11 28)	9	Employees of the Tobacco Manufacturers (India) Ltd and the Printers (India) Ltd	Incomte tax Officer Calcutta District III A	Assistant Commissioner of Income tax Bengal Calcutta	Do
		s of the Women s Medical Service and of the or Branch of the same	Income tax Officer Simla	Assistant Commissioner of Income tax Ambala	Commissioner of Income tax Punjab
	1	Employees of the Madras and Southern Mahratta Railway except those under the audit of the Audit Officer Railway Collieries Calcutta	Income tax Officer 4th Circle Madras	Assistant Commissioner of Income tax Central Range Madras	Commissioner of Income tax Madras
	11 A	All Government servants under the audit of the Accountant General Madras and the Deputy Accountant General Posts and Telegraphs Madras	Income tax Officer Fifth Circle Madras	Assistant Commissioner of Income tax Central Range Madras	Do

	12	Military employees under the audit of the Controller of Military Accounts Poona and Southern Command *Poona*	Income tax Officer Poona District	Assistant Commissioner of Income tax Central Division Poona	Commissioner of Income tax Bombay
(No 36—I T dated 1928)	13	Government servants under the audit of the Accountant General *Central Revenues except those of the* Indian Audit and Accounts Service attached to Railway and Postal Audit Offices and Currency Offices Rangoon and Madras the Military Accountant General the Deputy Accountant General Posts and Telegraphs Delhi and Audit Officer Indian Stores Department	Income tax Officer Salary Circle Delhi	Assistant Commissioner of Income tax Delhi	Commissioner of Income tax, Delhi
	14	Non Enemy Nationals paid *through the Controller* Local Clearing Office (Enemy Debts)	Do.	Do	Do
	15	Employees of the North Western Railway except those under the audit of the Audit Officer Railway Collieries Calcutta	Income tax Officer Railway Salary Circle Lahore	Assistant Commissioner of Income tax Lahore	Commissioner of Income tax Punjab
	16	Employees of the Bombay Baroda and Central India Railway Company and the Great Indian Peninsular Railway Company except those under the audit of the Audit Officer Railway Collieries Calcutta	Income tax Officer Salary Branch Bombay City	Assistant Commissioner of Income tax Bombay City	Commissioner of Income tax Bombay
	17	Government servants under the audit of the Deputy Accountant General Posts and Telegraphs Nagpur	Income tax Officer Salary Circle Nagpur	Assistant Commissioner of Income tax Southern Charge Nagpur	Commissioner of Income tax Central Provinces and Berar
	18	Employees of the Eastern Bengal Railway	Income tax Officer Railway Salaries Circle Calcutta	Assistant Commissioner of Income tax Calcutta	Commissioner of Income tax Bengal
	19	Residents outside British India applying for refund of income tax under Section 48 of the Indian Income tax Act 1922	Income tax Officer Non Residents Refunds Circle Bombay		Commissioner of Income tax Bombay
	20	Share holders residing outside British India of a Company when the income of the non resident share holders arises in more than one British Indian Province	Do	Assistant Commissioner of Income tax Bombay City	Do

* Notifications referred to in brackets are a nending notifications

No and date of Notification	Serial No	Persons	Officer appointed to perform the functions of—		
			Income tax Officer	Assistant Commissioner of Income tax	Commissioner of Income tax
1	2	3	4	5	6
	21	Employees of the American United Presbyterian Mission, residing in the United Provinces, the Punjab and the North West Frontier Province	Income tax Officer Gujranwala	Assistant Commissioner of Income tax, Lahore	Commissioner of Income tax, Punjab
	22	Employees of all Railway Collieries who are under the audit of the Audit Officer, Railway Collieries, Calcutta	Income tax Officer Railway Salaries Circle, Calcutta	Assistant Commissioner of Income tax, Calcutta	Commissioner of Income tax Bengal
	23	Employees of the Rajputana Minerals Company, Ltd	Income tax Officer, Salaries, Bombay	Assistant Commissioner of Income tax, Bombay City	Commissioner of Income tax, Bombay
No 11—I T, dated 31 3 28	24	All persons assessed under Section 44 C	Income tax Officer, Non residents Refunds Circle, Bombay	Assistant Commissioner, Bombay City	Do
No 14—I T, dated 21 4 28	25	Government servants under the audit of the Accountant General, Bihar and Orissa Government pensioners Employees of the Tata Iron Steel Company at Jamshedpur Employees of the Tin Plate Company of India Ltd, Golmuri Staff of the Imperial Agricultural Institute Pusa Employees of the Central India Coalfields Railway	Income tax Officer, Salaries Circle, Ranchi	Assistant Commissioner of Income tax, Ranchi	Commissioner of Income tax, Bihar and Orissa
No 16—I T dated 12 5 28 and No 21—I T	26	Europeans employed by Messrs Ralli Brothers in their Bombay and Karachi branches	Income tax Officer, District III A, Calcutta	Assistant Commissioner of Income tax Bengal Calcutta	Commissioner of Income tax Bengal

dated 26 5 28					
No 6—I T, dated 9 3 29	27	Military employees under the audit of the Controller of Military Accounts Presidency and Assam District Calcutta	Income tax *Officer Railways* and Miscellaneous Salaries Circle Calcutta	*Assistant Commissioner* of Income tax Calcutta	Do.
No 25—I T dated 9 11 29	28	Employees *of the British India* Corporation Ltd Stationed at Rangoon	Income tax Officer, Cawnpore	Assistant Commissioner of Income tax Cawnpore	Commissioner of Income tax, Bengal
No 26—I T dated 9 11 29	29	Military employees stationed in Sind and under the audit of the Controller of Military Accounts R A F Amballa	Income tax Officer, Amballa	Assistant Commissioner of *Income tax Eastern Division* Punjab	Commissioner of Income tax Punjab

Previous law—

The Central Board of Revenue took over the functions of the Board of Inland Revenue in 1924 Its constitution is governed by the Central Board of Revenue Act (IV of 1924) and the rules thereunder It deals at present with the principal central heads of revenue, *viz*, Customs, Taxes on Income, Salt, Opium, and (to the extent that the Central Government is concerned) Stamps and Excise

The arrangements for the collection and administration of income tax have undergone radical alterations since 1886 For a history, *see* the Introduction

United Kingdom Law—

The machinery for the assessment, collection and administration of income tax in England is very complicated The Board of Inland Revenue are by Statute specifically entrusted with the care and management of income tax, and are given power to do—

"All such acts as may be deemed necessary and expedient for raising collecting, receiving and accounting for the tax or the like in as full and ample a manner as they are authorized to do with relation to any other duties under their care and management"— (Income tax Act, 1918, section 57) (In the Income tax Acts the Board of Inland Revenue are referred to as the Commissioners of Inland Revenue), but the Board of Inland Revenue have ordinarily nothing to do with assessments or appeals against assessments This work is entrusted, broadly speaking, to two bodies of Commissioners, known respectively as (*a*) Commissioners for general purposes, or District Commissioners, and (*b*) Special Commissioners District Commissioners are scattered throughout Great Britain in divisions of varying sizes All of them are non officials The Special Commissioners have their offices in London, and occasionally hold meetings elsewhere They are all officials Ireland is under the jurisdiction of the Special Commissioners In addition to these two bodies there is a third body of persons known as Additional Commissioners who are appointed by the General Commissioners for the division These Additional Commissioners make the initial assessments under Schedule D, and appeals are heard by the General Commissioners In some divisions a small group of the General Commissioners make the initial assessments, and the rest of the Commissioners hear the appeals In Ireland there are no Additional Commissioners, their place being taken by the Inspector of Taxes

Each body of Commissioners has a clerk who is appointed by them There is an Inspector of Taxes, a civil servant

appointed by the Board of Inland Revenue He has no statutory authority, not even to demand the production of any accounts or documents, but he is really, in practice, the power behind the Commissioners In addition there are Assessors appointed by the Commissioners, and also Collectors of Taxes similarly appointed by them In practice, however, the two offices are held by the same individual It would appear that the Assessors' duties are now a days confined only to issuing the forms of returns, and that the Inspector of Taxes has, to all intents and purposes, taken over the duties of the Assessors

Super tax can be assessed only by the Special Commissioners The same body also assesses railways, foreign and colonial dividends paid in the United Kingdom, and also deals with refunds It is also open to a tax payer under Schedule D to have his case assessed by, or, if an appeal, heard by the Special Commissioners instead of by the General Commissioners

As already observed, the administrative machinery in England is much too complicated to admit of a brief description, but an important feature should be mentioned Broadly speaking, where the assessment is made or appeal is heard by the General Commissioners or by the Special Commissioners, the procedure is somewhat like that of a Court, and, along with the assessee, the Inspector of Taxes also is heard on behalf of the Revenue From the appeal of the Special or the General Commissioners, as the case may be, a reference lies to the High Court on questions of law It will be seen that the Commissioners of Inland Revenue have nothing to do directly with the assessments, the Inspector of Taxes representing them before the assessing Commissioners In recent years, however, limited powers have been given to the Board of Inland Revenue to decide cases, for example, whether a particular person is ordinarily resident in the United Kingdom or not

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CHAPTER III

TAXABLE INCOME

Heads of income chargeable to income tax

6 Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing, namely:—

(i) Salaries

(ii) Interest on securities

(iii) Property

(iv) Business

(v) Professional earnings.

(vi) Other sources.

History—

In the Act of 1886, Income was taxed under four separate schedules—Salaries, etc , Interest on Government securities; Profits of Joint Stock Companies, and other Income In the 1918 Act, the present six fold classification was introduced, but the wording was slightly different as below —

(iii) Income derived from house property;

(iv) Income derived from business,

(vi) Income derived from other sources,

and a decision of a Court[28] confined (iii) only to residential house property The Act was therefore amended in 1920 It will be seen that (iii) in the present Act is wider, and extends not only to residential house property but to all buildings and (appurtenant) lands not used for business—see sections 9 and 10 The word 'property' is used both in sections 6 and 9 in the restricted sense given in section 9 and not in the wide sense associated with that word[29] Another change made in 1922 was the substitution of the word 'heads' for 'classes' The words "profits and gains" were also added in 1922

Scope of section—

Section 6 merely sets out the different sources of income, the manner of taxing each head, or rather the method of computing income under each head is explained in the following sections As to the nature of the income falling under each of the categories set out in this section, see the notes under sections 7 to 12

Though chapter I is headed "Charge of Income tax" this section is really the charging section inasmuch as it sets out the different categories of taxable income—see the ruling of the Privy Council in the case of *Raja Probhat Chandra Barua*

It is arguable, though probably not correct to hold, that by the substitution of the word 'heads' for 'classes' the categories enumerated in the Section have ceased to be exhaustive, and that income from 'business connection'—*vide* section 42—is taxable as a separate category, over and above the six categories in section 6 See notes under section 42 as to the meaning of 'business connection''

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(28) *Powe & Co v Secretary of State* 1 I T C 161

(29) *Probhat Chandra Barua v Commissioner of Income tax Assam* 5" I A 228 59 M L J 814 (P C)

The tax is not on gross receipts but on "income, profits and gains", *i e*, after deductions have been made as provided under sections 7 to 12 [30]

United Kingdom Law—

The corresponding provision in the United Kingdom law is the Schedules—which are far more complicated, and not so well arranged, as will be seen below

In the United Kingdom the tax is charged under five Schedules as below —

Schedule A—

In respect of the property in all lands, tenements, here ditaments, and heritages in the United Kingdom This is known as the 'property' or the owners' tax, and covers not only lands and buildings but also mines, gas works, water works, salt springs, docks, railways, fisheries, roads, markets, fairs, tolls, bridges, ferries, etc Needless to say, it also includes agricul tural lands It will be seen that this Schedule partly covers the following heads under the Indian law, *viz*, Property, Business and Other sources There are elaborate rules as to how a pro perty shall be valued, what deductions may be allowed, which persons may be charged, and so forth These rules, however, are not of much interest to us in India

Schedule B—

In respect of the occupation of all lands, tenements, here ditaments, and heritages in the United Kingdom This is known as the occupiers' tax There is no corresponding tax in India

Schedule C—

In respect of all profits arising from interest, annuities, dividends, and shares of annuities payable out of any public revenue This corresponds to a part of the tax on Securities in India under section 8

Schedule D—

In respect of—

(*a*) The annual profits or gains arising or accruing—

(i) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and

(ii) to any person residing in the United Kingdom from any trade, profession, employment or vocation, whether

(30) *Problat Chandra Barua v Commissioner of Income tax Assam* 57 I A 228 59 M L J 814 (P C)

(iv) Business
(v) Professional earnings
(vi) Other sources.

History—

In the Act of 1886, Income was taxed under four separate schedules—Salaries, etc, Interest on Government securities, Profits of Joint Stock Companies, and other Income In the 1918 Act, the present six fold classification was introduced, but the wording was slightly different as below —

(iii) Income derived from house property,
(iv) Income derived from business,
(vi) Income derived from other sources,

and a decision of a Court[28] confined (iii) only to residential house property The Act was therefore amended in 1920 It will be seen that (iii) in the present Act is wider, and extends not only to residential house property but to all buildings and (appurtenant) lands not used for business—see sections 9 and 10 The word 'property' is used both in sections 6 and 9 in the restricted sense given in section 9 and not in the wide sense associated with that word[29] Another change made in 1922 was the substitution of the word 'heads' for 'classes' The words "profits and gains" were also added in 1922

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It is arguable, though probably not correct to hold, that by the substitution of the word 'heads' for 'classes' the categories enumerated in the Section have ceased to be exhaustive, and that income from 'business connection'—*vide* section 42—is taxable as a separate category, over and above the six categories in section 6 See notes under section 42 as to the meaning of 'business connection"

(28) *Rowe & Co v Secretary of State* 1 I T C 161
(29) *Probhat Chandra Barua v Commissioner of Income tax Assam* 57 I A 228 59 M L J 814 (P C)

The tax [illegible] on gross [illegible] but on [illegible] income, profit and gain [illegible] deduction have been made as provided under sections 7 [illegible]

United Kingdom Law—

The corresponding [illegible] in the United Kingdom law [illegible] the Schedules—which are [illegible] more [illegible] well arranged, as will be seen below.

In the United Kingdom the tax [illegible] charged under the Schedule as below:—

Schedule A—

In respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom. This is known as the 'property [illegible] owners [illegible] land and buildings but also [illegible] springs, docks, railways, [illegible] bridges, ferries, [illegible] tural lands. It will be seen [illegible] following head [illegible] and Other sources. [illegible] perty shall be valued [illegible] persons may be charged [illegible] are not of much [illegible]

Schedule B—

In respect of the occupation of [illegible] lands, tenements, hereditaments, and heritages in the United Kingdom. This is known as the occupiers tax. [illegible] in India.

Schedule C—

In respect of all [illegible] dividends and shares [illegible] revenue. This corresponds [illegible] India under section 8.

Schedule D—

In respect of—

(a) The annual profits [illegible]

(i) to any person [illegible] Kingdom from any kind of property [illegible] United Kingdom or elsewhere [illegible]

(ii) to any person [illegible] Kingdom from any trade, profession [illegible]

[illegible]

the same be respectively carried on in the United Kingdom or elsewhere, and

(iii) to any person, whether a British subject or not, although not resident in the United Kingdom, or from any trade, profession, employment, or vocation exercised within United Kingdom, and

(*b*) All interest of money, annuities, and other annual profits or gains not charged under Schedule A, B, C or E, and not specially exempted from tax, in each case for every twenty shillings of the annual amount of the profits or gains

Tax under this Schedule shall be charged under the following cases respectively, that is to say—

Case I—Tax in respect of any trade not contained in any other Schedule

Case II—Tax in respect of any profession, employment, or vocation not contained in any other Schedule,

Case III—Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this Case;

Case IV—Tax in respect of income arising from securities out of the United Kingdom, except such income as is charged under Schedule C,

Case V—Tax in respect of income arising from possessions out of the United Kingdom,

Case VI—Tax in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other Schedule,

and subject to and in accordance with the rules applicable to the said Cases respectively

This is the most important of the Schedules, and covers the heads, Business, Professional earnings, a part of Securities and a part of 'Other sources' under the Indian law

Schedule E—

In respect of every public office or employment of profit, and in respect of every annuity, pension, or stipend payable by the Crown or out of the public revenue of the United Kingdom other than annuities charged under Schedule C This covers a part of the head 'Salaries' under the Indian law. the other part, that is to say, salaries paid by private employers, etc, being included in Schedule D

Under each Schedule there are elaborate rules as to computation, deductions, etc, and a reference to these rules and to the extent that they can be followed in India, is made under the corresponding sections in the Indian Act

Income tax is a single tax—

In *London County Council v Attorney General*[31] it was contended on behalf of the Inland Revenue that the Income tax on property was totally distinct from Income tax on profits etc, a separate tax so to speak, and that there was nothing to prevent the same income being taxed twice over in the hands of the same person This view had been sometimes upheld by Courts, but the House of Lords overruled it

Per *Lord Macnaghten*—Income tax if I may be pardoned for saying so is a tax on income It is not meant to be a tax on anything else It is one tax not a collection of taxes essentially distinct There is no difference in kind between the duties of income tax assessed under Schedule D and those assessed under Schedule A or any of the other Schedules of charge One man has fixed property another lives by his wits each contributes to the tax if his income is above the prescribed limit The standard of assessment varies according to the nature of the source from which taxable income is derived That is all In every case the tax is a tax on income whatever may be the standard by which the income is measured But to read the enactment as imposing a double duty (on the same person and on the same item) would be contrary to the whole scope of Income tax legislation and whimsical in the highest degree

The above remarks apply *a fortiori* to India In the United Kingdom, there are no provisions like section 18 (5) of the Indian Act which says that tax paid at source shall be 'credited' to the account of the assessee nor a rule like Rule 27 Nor is 'set off' allowed in the United Kingdom as between different sources of income It is allowed for all practical purposes only under Schedule D, and even so in respect of trading profits and losses only These provisions in the Indian law show even more conclusively than in the United Kingdom that the tax is a single tax on income A further point is that assessees in the United Kingdom are not allowed to deduct interest on borrowed capital, salaries paid to employees, etc, from profits The assessee has to pay tax on the gross profits, but is legally entitled to deduct the Income tax from the persons to whom he pays salaries, interest, etc In other words, it is only by implication that the United Kingdom laws exclude from taxation what are strictly speaking, not the assessee's income but payments due to others On the other hand the Indian law expressly excludes most such payments from income, *e g* interest on debentures interest on borrowed capital, etc The general scheme of the Indian Act, though not so stated in terms anywhere is to tax the assessee's net income The idea of the sources of tax being water tight

(31) 4 Tax Cases 265

as against each other, is more repugnant to the Indian law than to the United Kingdom law, and the same income cannot be taxed twice over in the hands of the same person on the ground that it appears in two sources The most common instances of such cases are when income from property or interest on investments enters into 'Business' The assessee cannot be taxed on property as such, and again on that portion of the business profits which includes income on property which has already been taxed, and there is express provision for this As regards investments, the position is clear as regards Insurance Companies, and Rule 27 says that the tax on the excess of income from investments deducted at source over the net profits of the Company ascertained actuarially (or by estimate), shall be refunded In respect of other Companies the position is not so clear, though Section 18 (5) evidently means that if the income from investments exceeds the net profits of the business, the excess shall be refunded The position becomes complicated when the only business is that of investments with borrowed capital See notes under sections 8 and 10

Double taxation—Presumption against—

Per Lord Justice Brett in *Gilbertson v Fergusson*[32]

"Now it may be true that there are no specific words in this statute which point out that the Government are not to receive the tax twice over but it would be so clearly unjust and obviously contrary to the meaning of the statute that the Government should have the tax payable twice over by the same person in respect of the same thing, that I should say it was a necessary implication that it could not be right"

This principle has been followed in all subsequent English decisions There is, of course, no double taxation if different persons are taxed in respect of what may seem the same income at first sight

"Money passes through the hands of a great number of people you have received your money and have paid Income tax upon it and then you pay it out again to other people and they make a profit out of it and they pay Income tax upon it again"[33]

Per Lord Macnaghten in *Attorney General v London County Council*[34]

"Speaking generally all income is chargeable but chargeable only once Income is brought into charge at its source and the burden is then distributed among the recipients of the income who bear their share in just proportion"

(32) 1 Tax Cases 501

(33) Per *Grantham J* in *Leeds Building Society v Mallandaine* 3 Tax Cases 577

(34) 5 Tax Cases 242

The concluding part of this dictum is not of much interest in India In the United Kingdom the person who is taxed in the first instance is refused some deductions from the taxable income on account of payments made to other persons, but is legally authorized to deduct income tax from the payments that he makes to his creditors, and thus reduce his own share of income-tax See notes under section 18

"There could be double taxation if the Legislature distinctly enacted it, but upon general words of taxation, and when you have to interpret a Taxing Act you cannot so interpret it as to tax the subject twice over to the same tax But it all depends on its being the same tax and there is nothing to prevent either one Legislature or two Legislatures if they have jurisdiction over the subject matter, imposing different taxes on the same subject matter '[35]

Double Taxation—

Per Mukerjee, J in *Manindra Chandra Nandi* v *Secretary of State*[36]

It may be conceded that Courts always look with disfavour upon double taxation and Statutes will be construed, if possible to avoid double taxes see the observations in *Carr* v *Fowle*[37] To the same effect are the observations of Chief Justice Waite in *Tennessee* v *Whitworth*[38] in which that learned Judge in delivering the unanimous opinion of the Supreme Court of the United States remarked as follows —

'It is no doubt within the power of a State to subject a corporation to double taxation Double taxation, however, is never to be presumed If property is taxed once in one way it would ordinarily be wrong to tax it again in another way when the burden of both taxes falls on the same person Sometimes tax laws have that effect, but if they do it is because the Legislature has unmistakably so enacted All presumptions are against such an imposition '

But when the Legislative intent is clear and unmistakable effect must be given to the statutory provisions on the subject The question of double taxation is one of expediency for the consideration of the Legislature *it cannot be affirmed, as a matter of law, that double taxation is* forbidden see the decision of the Supreme Court of the United States in *Davidson* v *New Orleans,*[39] *New Orleans* v *Houston*[40] see also *Reclamation* v *Hagar*[41] and *United States* v *Benzon*[42] It must be held consequently that the royalty received by the plaintiff is liable to be assessed

(35) Per Channel J in *Stevens* v *The Durban etc Mining Company* 5 Tax Cases 402

(36) 34 Cal 257

(37) (1893) 1 Q B 251

(38) (1886) 117 U S 139

(39) (1877) 96 U S 97

(40) (1886) 119 U S 265

(41) (1880) 6 Sawyer 567, 4 Fed Rep 366

(42) (1865) 2 Cliff 512, 24 Fed Rep 1112

with cesses, as it is part of the net annual profits from the mine and it is also liable to be assessed with income tax inasmuch as it is taxable 'income' within the meaning of the Income tax Act "

Again in the *Raja Probhat Chandra Baru's Case*[43] per Rankin, J —

' Some reference was also made to what has been called a presumption against double taxation ' In *Manindra Chandra Nandi* v *Secretary of State*,[44] royalties from a coal mine were held liable both to cess under the Cess Act 1880 and to income tax under the Act of 1886 but it was said that 'it may be conceded that Courts always look with disfavour upon double taxation and statutes will be construed if possible to avoid double taxes ' Reference was made to certain dicta of American Courts and to the English case of *Carr* v *Fowle*[45] But the only observation in this case was to the effect that the statute presumably did not intend that a vicar should in effect pay the same tax (land tax) twice on the same hereditament This is plain enough Thus the income tax is one tax and income assessed under one Schedule cannot be assessed all over again under another That there is any legal presumption of a general character against 'double taxation' in any wider sense is a proposition to which I respectfully demur as a principle for the construction of a modern statute In *Manindra Chandra Nandi* v *Secretary of State*[44] it did not avail to cut down clear though absolutely general language "

In *Mukund Sarup's Case*[46] (Allahabad), there are suggestions that the Legislature should be presumed not to have intended to tax the same source of income under different Acts but these suggestions were questioned by the Patna High Court in *Rajniti Prasad Singh's Case*, who were disposed to agree with the views of Rankin, J , quoted above

Holding Companies—Taxation of—

It should be mentioned in this connection that the taxation to super tax of dividends received by holding companies does not, in theory, involve any double taxation The super tax paid by companies in India is not in any sense paid on behalf of the shareholder—see section 14, it is really of the nature of a corporation tax *on profits* Double taxation can arise only if the *same* person is taxed twice in respect of the same income

Can the Crown choose the head under which to tax?—

The answer to the question whether it is open to the Crown to recover tax at its discretion under a particular source of income, when the assessee has income from more than one

(43) 1 I T C 414
(44) 34 Cal 257
(45) (1893) 1 Q B 251
(46) 2 I T C 495

source, is not clear The law in the United Kingdom was laid down in several decisions —*Norwich Union Fire Insurance Co* v *Magee*[47], *Revell* v *Edinburgh Life Insurance Co*[48], *Liverpool and London and Globe* v *Bennett*[49] and it was generally recognised that the Crown had the right to choose the source under which the income may be taxed The problem arises in respect of investments in the course of business, chiefly that of Insurance Companies The Crown can tax either the investments (*less* a deduction for expenses of management—for which there are special provisions) or the net profits of the business including the investments

The question whether income from lands and buildings can be assessed alternatively under Schedules A and B and under Schedule D was examined by the House of Lords in *Fry* v *Salisbury House Estates, Ltd*, and it was decided that the assessment must be made under Schedules A and B The option of the Crown in respect of other schedules and in respect of the different cases of Schedule D was left undecided

The position in India is different In the case of Insurance Companies, Rule 27 makes the position clear beyond doubt If the interest on investments of such a company exceeds the profits of the company *actuarially ascertained* (or *correspondingly* under Rules 25 *et seq*), the excess income tax paid on the interest at source is refunded to the company The Crown, therefore, has no right to choose the source under which it will tax the company As regards other assessees, the position depends entirely on the meaning of section 18 (5) The words "Credit shall be given to him therefor in the assessment, if any, *made for the following year under the Act*" would seem to imply no such option in India, as in the United Kingdom, to the income tax authorities "Credit shall be given" can only mean that the payment is a provisional payment, the final liability depending on something else Section 18 does not determine the final liability It is only a 'machinery' section, and arranges for the provisional collection of taxes at source The words, as they stand, do not authorize the Crown to refuse to refund the tax collected under section 18 (5), if the 'total income' of the assessee is less than the income from interest on securities or salaries Besides, the assessment is made with reference to 'total income' (sections 22 and 23), and 'total income' is defined in section 16 Under section 24, set off is

(47) 3 Tax Cases 457

(48) 5 Tax Cases 221

(49) 6 Tax Cases 327

allowed as between the different sources of income. It is clear from these provisions and section 48 (3) that if the interest on investments made by an assessee, is in excess of his 'total income' (after set-off), the tax deducted at source on the interest on investments is partly or wholly refundable. In the *United Kingdom*, the right of set-off is restricted. It is allowed, generally speaking, only in respect of 'Schedule D', and even so, only in respect of 'trading'. In India, on the other hand, the law allows set-off in respect of *all* sources of income.

Salaries

7. (1) The tax shall be payable by an assessee under the head "Salaries" in respect of any salary or wages, any annuity, pension or gratuity, and any fees, commissions, perquisites or profits received by him in lieu of, or in addition to, any salary or wages, which are paid by or on behalf of Government, a local authority, a company, or any other public body or association, or by or on behalf of any private employer :

[50]*Explanation.*—The right of a person to occupy, free of rent, as a place of residence, any premises provided by his employer, is a perquisite for the purposes of this sub-section.

Provided that the tax shall not be payable in respect of any sum deducted under the authority of Government from the salary of any individual for the purpose of securing to him a deferred annuity or of making provision for his wife or children, provided that the sum so deducted shall not exceed one-sixth of the salary.

(2) Any income which would be chargeable under this head if paid in British India shall be deemed to be so chargeable if paid to a British subject or any servant of His Majesty in any part of India by Government or by a local authority established by the Governor-General in Council.

(50) Inserted by the Income tax (Amendment) Act, 1923 (XV of 1923)

History—

For corresponding provisions in the 1886 Act, *see* sections 3 (4), 3 (5), 7, 8 and 9 of that Act

In the 1918 Act, the 'explanation' clause did not exist There was another proviso under the first sub section which exempted the salaries of soldiers drawing less than Rs 500 per mensem, which exemption was cancelled in 1920 Also the section did not extend to salaries paid by all private employers—*see* paragraph 23 of the Income tax Manual cited below

Salaries—(Section 7) — The income taxable under this head includes not only fixed salaries or wages and annuities or pensions but also any fees commissions perquisites or profits received in lieu of or in addition to salaries or wages which are paid to an employee by or on behalf of any employer Under the Act of 1918 the income chargeable under this head applied only to salaries in the above sense when paid by or on behalf of Government a local authority or company any other public body or association or by or on behalf of any private employer who had entered into an agreement with the Income tax Officer to recover the tax on behalf of Government but under the present Act it applies to all salaries paid by or on behalf of every private employer, the obligation to deduct income tax from salaries being under section 18 (2) of the Act an obligation on every employer (*Income tax Manual*, para 25)

Residences—Value of—Explanation—

The 'explanation' in sub section (1) was introduced in 1923 Under the Act of 1918 [section 3 (2) (*ix*)] 'a perquisite or benefit which is neither money nor reasonably capable of being converted into money' was exempt from taxation This was merely the English law as expounded by the House of Lords in *Tennant* v *Smith*[1] In 1922 it was definitely decided to abandon this position, as it led to inequalities in assessments See the Statement of Objects and Reasons of the Amending Bill and the Report of the Select Committee The intention, therefore, was to tax perquisites and benefits that possessed a money value whether or not they were in fact capable of conversion into money But the wording of section 7 did not fully carry out this intention The word received' is evidently used here as the correlative of paid and the word paid clearly connotes a payment in money and in no sense could it be said that a rent free residence was paid' to a person Hence the introduction of an 'explanation' clause

Perquisites—Other than residences—

The position regarding benefits other than free residences, *e g* free medical advice, free conveyance for other than official

(1) (1892) A C 150 3 Tax Cases 158

duties, free board, etc, is evidently governed by the principle of *Tennant* v *Smith* [1a] Such benefits are not reasonably capable of conversion into money, and they are no more 'paid' than free residences These benefits are therefore not taxable

Residence—Value of—Limitation—

By executive orders (*Vide* para 22 of the Income tax Manual) it has been arranged that when a rent free residence or residences form part of the perquisites of an employee, the money value of the perquisite should not be taken at more than 10 per cent of the salary of the employee The 10 per cent is calculated on the salary and not on his 'total income'

Salaries—Tax on—Collection of—

As to how taxes are collected on 'salaries', *see* section 18, as regards the annual returns to be furnished by employers, *see* section 21, and as regards refunds, *see* section 48

Meaning of words—

Salary — Signifies a recompense or consideration given unto any man or his pains bestowed upon another man s business ' (Terms *de la ley*) (Stroud)

Wages — Though this word might be said to include payment for any services yet in general the word salary is used for payment of services of a higher class and 'wages is confined to the earnings of labourers and artisans '[2]

Wages then are the *personal* earnings of labourers and artisans " (Stroud)

This distinction between salary and wages is of no importance in India, as the law does not prescribe different arrangements for the taxation of salaried persons and wage earners as the United Kingdom law does In the United Kingdom the question has been one of importance; for a discussion see *G W Railway* v *Bater* [3]

Annuity — A yearly payment of a certain sum of money granted to another in fee for life or years charging the person of the granter only (Co Litt 144 *b*) (Stroud)

But in this context it simply represents a recurring annual payment

Pension —Is really deferred pay or a compensation for past services, etc , and is sometimes distinguished, in India at any rate, from 'gratuity', the latter denoting lump sum payments while the former denotes periodical recurring payments

(1-*a*) (1892) A C 150 3 Tax Cases 158

(2) Per *Grove J* in *Gordon* v *Jennings* 51 L J Q B 417

(3) (1921) 2 A C 1, 8 Tax Cases 231

But according to the Concise Oxford Dictionary, 'gratuity' means "a money present of amount fixed by giver in recognition of an inferior's good offices"

Fees—Here evidently refer to fluctuating payments depending on the work done as distinguished from salaries, etc, which are fixed with reference to a period of time

Commissions—Hardly requires any elucidation

Perquisites—See notes under section 4 (2) *(vi)*

Received— Income under this head is always included in the income of the year in which it is received irrespective of the period in respect of which it was earned with the solitary exception that where an officer of Government takes an advance of pay the tax is not chargeable on the advance but the tax is charged on the full salary of the month in which the advance is recovered by deduction without any regard to the deduction A portion of a salary withheld under the orders of a Court is liable to tax ' (*Income tax Manual* para 25)

In this connection see the words "which are *paid* by or on behalf of Government, etc, " and the absence of any interpretation clause as in sections 10 to 13 Section 13 does not apply to salaries, *i e* the method of accounting followed by the recipient of the salary does not affect the computation

Honoraria—

Honoraria or fees paid to Government servants by local bodies or private persons companies etc, for professional work, the whole of which is in the first instance credited to Government, after which the whole or part is drawn under proper sanction by the Government servant concerned on a bill should be taxed as salary by deduction at source They are obviously fees, commissions, or perquisites received in addition to salary and paid by or on behalf of Government [section 7 (1)]

Place of payment—Immaterial—

The expression "paid by Government, etc" does not mean paid in India The tax is chargeable irrespective of the place of payment, even though such place be not merely outside British India but outside India It will be sufficient if the income clearly accrues or arises in British India The second sub section applies to income which is neither paid in British India nor accrues or arises in British India See also the amendment to section 18, sub section 2 *(a)*, introduced in 1925

Salary, etc. need not be monthly—

The law says nothing as to the intervals at which salaries, etc, need be payable If the pay is, say, annual, and advances are given from time to time, such advances cannot be taxed An 'advance' is of a capital nature and therefore not taxable On

the other hand if the so called advances are really payments in instalments, they would be taxable

Perquisites of office—

As to what are or are not perquisites of an office that are "received in lieu of or in addition to salary, etc" see the decisions set out under section 4 (3) (*iii*)

Salaries—Pensions paid by Foreign Governments—

The salary paid by a Foreign Government or an Indian State cannot fall under this section Such a State is not Govern ment (see General Clauses Act), nor a local authority (*ibid*), nor a company [see section 2 (6)], nor a public body or association, nor a private employer A foreign State can hardly be considered a public body or a private employer Such 'salaries' are there fore income under 'other sources' under section 12 though with some straining they may be considered to be income from a profession under section 11 In either case deduction of tax cannot be made at source, and the Income tax Officer can only recover the tax after assessing the income at the end of the year.

Annuities—Not paid by employer—

This section does not apply to annuities other than those paid by Government, etc , or a private employer Such annuities, *e g*, under a will or paid by an Insurance Company fall under 'income from other sources'—section 12, and the tax on such annuities cannot be deducted at source under section 18

United Kingdom Law—

The law in the United Kingdom about the taxation of salaries is as below Tax under Schedule E is charged

> "in respect of every public office or employment of profit" and "in respect of every annuity, pension or stipend payable by the Crown or out of the public revenue of the United Kingdom other than annuities under Schedule C "

As to what constitutes 'public' office there has been much dispute—see *Great Western Railway* v *Bater*[4], and in respect of an office which is not 'public' the tax is levied under Schedule D on the employer who is permitted to retain the tax on account of 'annual payments paid out of profits' Also the tax under Schedule E has for a long time been on an annual basis, whereas under Schedule D it was till recently on the basis of an average of three years

As regards the difference between India and the United Kingdom—in the taxation of perquisites not capable of conver

(4) (1921) 2 A C 1, 8 Tax Cases 231

sion into money—see the notes regarding the Explanation under sub section (1)

Proviso—Deductions—

The proviso to sub section (1) applies only to compulsory deductions made under the authority of Government and not to compulsory deductions made by other employers [see paragraph 20 cited under section 4 (3) (iv)] The amount exempted under this proviso has however to be taken into account under section 16 (1) in computing the total income of an assessee for the purposes of determining whether he is liable to tax and the rate at which he is to be assessed An assessee for example who has a salary of Rs 180 per mensem or Rs 2 160 per annum and from whose salary a compulsory deduction is made by the authority of Government of Rs 300 per annum of the nature referred to in this proviso is liable to pay income tax on Rs 1 860 at the rate applicable to an income of Rs 2 160

Under section 58 of the Act this proviso does not apply to super tax that is no allowance of this is made for super tax purposes (*Income tax Manual* para 25)

Under the General Clauses Act (X of 1897) 'Government' includes Local Governments deductions made under the orders of Local Governments are also therefore entitled to this exemption

Deductions from salaries—United Kingdom Law—

The corresponding provision in the United Kingdom is as below —

Any person who is under any Act of Parliament liable to the payment of an annual sum or to the deduction of an annual sum from his salary or stipend in order to secure a deferred annuity to his widow or a provision to his children after his death shall be entitled to deduction of the amount of the annual premium etc

The one sixth limit applies as here and the deduction is subject not only to the same conditions *i e* including insurance premia paid (section 15) but to others—see notes under section 15

It will be noticed that in the United Kingdom a deduction is not admissible on account of a deferred annuity for the assessee himself, though it is allowed if the contract is with a company The reason probably is that there is no case in which an Act of Parliament prescribes such deductions in order to secure deferred annuities for the assessee himself

Private provident funds—

As regards deductions on account of private provident funds, see notes under section 4 (3) (i)

As regards 'recognised provident funds', see section 15 and chapter IX A

A payment made on retirement, etc, to an employee from a private provident fund, not recognised under chapter IX A, that has been formed into a Trust, cannot be regarded as a payment of salary within the meaning of section 7 (1) of the Indian Income tax Act (XI of 1922) because the trust is not the employee's employer Such a payment is therefore not liable to taxation by deduction of tax at source

Salaries—Exemption—

For classes or portions of 'salaries' which are entirely exempt from tax see exemptions under section 60

Salaries paid in India but outside British India—

Section 7 (2) —This sub section makes chargeable under this *head* salaries paid from Indian revenues to Government employees in any part of India and salaries paid by a local authority established in exercise of the powers of the Governor General in Council All servants of Government or of such local authorities are therefore liable to pay tax on their salaries if they are employed in any part of India and irrespective of their nationality

The words or any servant of His Majesty in this sub section were inserted in the Act of 1918 so as to bring all servants of the Crown whether British subjects or not within the purview of this sub section on the ground that it seemed unnecessary to give to persons who were not British subjects specially favourable treatment which was not accorded to British subjects

The pay of officers whose services have been lent to and whose salaries are paid by Indian States are not chargeable to income tax under this section unless they are drawn or received in British India but the leave allowances and pensions of such officers are chargeable to income tax unless covered by any of the exemptions in paragraph 17 (under section 60) The Government of India recover contributions at fixed rates from the Indian States to meet the cost of leave allowances and pensions of officers in foreign service and make themselves responsible for paying the leave allowances and pensions of their employees earned in foreign service The portion of salaries of Government officers serving in Indian States which is paid in the first instance by the Government of India but is subsequently recovered from the State concerned is not liable to income tax (*Income tax Manual* para 26)

Object of sub-section (2)—

This sub section is necessary because otherwise the salaries would not be taxable, as they neither accrue nor arise in British India nor are received therein—see notes under section 4 (1) regarding the meaning of the word 'accrue' or 'arise' This sub section suggests that the exemption under section 60 exempting salaries of officers on deputation abroad who also receive their salaries abroad, is superfluous

Endowed income—Whether salary—

In *Secretary of State* v *Mohiuddin Ahmad*[5] the facts of which were peculiar, it was held that the Superior of a *khankha* (a kind of monastery) was the owner of the income from the endowment, and not the recipient of a salary therefrom The income in question was wholly agricultural and therefore exempt in the hands of the recipient, but if the Superior had been treated as a salaried employee he would have been taxable

Salaries—Paid free of tax—

A Railway Company had been assessed to income tax under Schedule E in respect of all offices or employments of profit held under the company In pursuance of a contract with its officers the company did not exercise its statutory right to deduct on payment of the salaries the tax in respect thereof payable by the company, and the Schedule E assessment had accordingly been made upon the company in a sum representing the amount of salaries actually paid *plus* the amount of income-tax thereon borne by the company on behalf of its officers *Held*, that the contract to pay the salaries free of income tax constituted in effect an agreement to pay the salaries *plus* the tax thereon and that the Schedule E assessment upon the company had been correctly computed by reference to the amount of salaries actually paid *plus* the tax thereon borne by the company[6]

In a later case it was held that the income tax paid by the employer on an employee's salary—even though under no legal obligation to do so—is part of the employee's emoluments for purposes of income tax[7]

Salaries, etc, paid outside India—

For a list of exemptions of certain kinds of salaries, see Notifications under section 60

Salary received in arrears or advance—

See section 60 regarding the powers of the Governor-General in Council to grant relief in cases in which as a consequence of salary being received in advance or in arrear income is assessed at an unduly high rate

Interest on securities

8 The tax shall be payable by an assessee under the head "Interest on securities in respect of the interest receivable by him on any security of the Government of India or of a Local

(5) 27 Cal. 674, 1 I T C 4

(6) *The North British Railway Company* v *Scott*, 8 Tax Cases 332

(7) *Hartland* v *Diggines* 5 A T C 117

Exemptions—

For interest on other securities, which are entirely exempt from tax, see items (6), (7), (8) and (17) of the exemptions under section 60

For interest on securities held by Provident Funds, see notes under section 4 (3) (*iv*) and (*ix*)

For interest on securities held by Charities, see notes under section 4 (3) (*i*) and (*ii*)

For interest on securities held by a Co operative Society, see exemption under section 60

Taxation at Source—

As in respect of salaries, so in respect of interest on securities, income tax is chargeable at source, *i e*, at the time the interest is paid The person paying the interest is personally responsible to the Crown for collecting the tax and making it over (section 18) Super tax is not deductible 'at source' even though the interest disbursed by the same person to a single individual may exceed Rs 50,000

The special provisions in section 57 apply only to profits of partners of firms and dividends of companies

As regards refunds, see section 48

Tax-free securities—

These are not tax compounded securities in the sense that the receiver of interest is credited with a notional payment of income tax The owner therefore is not entitled to any refund under section 48 (small incomes relief) or 49 (double tax relief) in respect of such tax constructively paid by him, not even in respect of tax free securities issued by a Local Government, though the tax in such cases is paid to the Government of India by the Local Government No agency is recognized in respect of such payments of tax as though they were paid on behalf of the owner of the securities This payment of tax is a matter entirely between the two Governments with which the holder of the securities is not concerned

Debenture—

'No one seems to know exactly what Debenture means (Buckl 192 citing *British India Steam Navigation Co v Inland Revenue*[8] in which Grove J said —This is a word which has no definite signification in the present state of the English language *Re Florence Land Co* Ex parte *Moor*[9] It should rather be said that no one has yet laid down an exhaustive definition of a Debenture The British India Steam Navigation Co s case shows that it is not true to say that a

(8) 50 L J Q B 517 7 Q B D 165

(9) 48 L J Ch 137 10 Ch D 530

Debenture is necessarily an obligation under seal or a charge on any property *Faute de mieux* it is suggested that a Debenture is a written Obligation or Acknowledgment in an impersonal form and with conditions more elaborate than those of a Promissory Note given by or for a Corporation or a Company to secure a sum of money Thus in the British India Steam Navigation Co s case Lindley J said— Now what the exact meaning of Debenture is I do not know I do not find any particular definition of it and we know that there are various classes of instruments called Debentures You may have Mortgage Debentures which are charges of some kind on property you may have Debentures which are Bonds you may have a Debenture which is nothing more than an Acknowledgment of debt you may have an instrument like this which is something more—It is a statement by two Directors that a Company will pay I think any Instruments of that sort may be Debentures So in *Brown* v *Inland Revenue* [10] Charles J said— A Debenture though never I believe legally defined is included under one or other of the three descriptions laid down by Bowen L J in *English and Scottish Trust* v *Brunton* [11] as — (1) a simple Acknowledgment under seal of the debt (2) an Instrument acknowledging the debt and charging the property of the Company with repayment (3) an Instrument acknowledging the debt charging the property of the Company with repayment and further restricting the Company from giving any prior charge (Stroud)

Other Securities for money—

There is no definition of this expression Generally speaking a security' is anything that makes money more assured in its payment or more readily receivable, as distinguished from a mere I O U, which is only evidence of a debt In its most general sense the expression would include Bank notes Bills of Exchange Promissory notes and cheques

Mortgages are securities for money [12] It does not include Bank stock (*Ogle* v *Knipe*) nor shares in a company [13] It would include a Life policy [14] Bonds,[15] Bills of Exchange Cheques and Promissory notes if complete (*Barry* v *Harding*) 1 Jo and Lat 475 *R* v *Hart* [16] *Goldsmid* v *Hampton* [17] (Stroud)

In this section of the Indian Income tax Act the expression 'securities for money' should evidently be construed *ejusdem generis* with debentures i e as referring to securities in the

(10) 64 L J M C 211
(11) (1892) 2 Q B 00 62 L J Q B 136
(12) *Dicks* v *Lambert* 4 Ves 725 *Ogle* v *Knipe* L R 8 Eq 434
(13) *Huddleston* v *Couldsbury* 10 Bea 547 *Re Maitland* 74 L T 2 4 *M Donnell* v *Morrow* 23 L R Ir 591
(14) *Lawrence* v *Galsworthy* 3 Jur N S 1049
(15) *Dicks* v *Lambert* supra *Mainland* v *Upjohn* 41 Ch D 142
(16) 6 C & P 106
(17) 5 C B N S 94

nature of debentures It would not therefore include a life policy or cheque on neither of which, by the way, would interest ordinarily be payable—nor bills of exchange nor promissory notes (on neither of which would interest be paid at fixed recurring periods, which is evidently the generic feature contemplated by the section) The expression evidently refers to bonds in the nature of debentures, and would clearly not include Bank deposits See however dicta cited below

United Kingdom Law—

Under the United Kingdom law it is a matter of much importance—especially when the income arises abroad to a resident—whether the income is from 'securities' or not The question therefore has often been raised what are 'securities'

' Shares in a company are not securities but portions of its capital ''[18]

'The holding of shares in a foreign corporation entirely situated and carrying on business in a foreign country comes unquestionably under Rule 5 (Case V)''—Per *Fletcher Moulton, L J* in *Gramophone and Typewriter Company* v *Stanley*[19] The point in this case was that if it was 'securities'' it fell under Case IV whereas otherwise it fell under Case V

The point was again raised in *Singer* v *Williams*[20]

Per *Lord Shaw*— The word Securities has no legal signification which necessarily attaches to it on all occasions of the use of the term It is an ordinary English word used in a variety of collocations, and it is to be interpreted without the embarrassment of a legal definition and simply according to the best conclusion one can make as to the real meaning of the term as it is employed in say a testament an agreement or a taxing or other statute as the case may be

Per *Lord Wrenbury*— A security I take it is a possession such that the grantee or holder of the security holds as against the grantor a right to resort to some property or some fund for the satisfaction of some demand after whose satisfaction the balance of the property or fund belongs to the grantor There are two owners and the right of the one has precedence of the right of the other A share in a Corporation does not answer the above description There are not two owners, the one entitled to a security upon something and the other entitled to the balance after satisfying the demand A share confers upon the holder a right to a proportionate part of the assets of the Corporation, it may be a proportionate part of its profits by way of dividend or it may be a proportionate part of its distributive assets in liquidation There is no owner other than himself '

Per *Viscount Cave*— The normal meaning of the word 'securities' is not open to doubt The word denotes a debt or claim the

(18) Per *Wright J* in *Bartholomay Brewing Company* v *Wyatt* 3 Tax Cases
(19) 5 Tax Cases 358
(20) 7 Tax Cases 419

payment of which is in some way secured The security would generally consist of a right to resort to some fund or property for payment, but I am not prepared to say that other forms of security (such as a personal guarantee) are excluded In each case however where the word is used in its normal sense some form of secured liability is postulated No doubt the meaning of the word may be enlarged by an interpretation clause contained in a statute but in the absence of any such aid to interpretation I think it clear that the word 'securities' must be construed in the sense above defined and accordingly does not include shares or stock in a company "

Receivable—When—Whether in British India—

It will be noticed that the word used in this section is 'receivable' and not the past tense 'received' like the word 'paid' in section 7 It will also be noticed that section 13 does not apply to income under this head, that is to say, the method of accounting followed by the assessee does not affect his liability under this head of income The question therefore arises whether having regard to the word 'receivable' the income under this head should be taken into account in the year in which the interest in question accrues and becomes payable to the assessee or in the year in which it is actually paid to him It will be seen from sections 18 and 19 that the Act contemplates, so far as income from this head is concerned, the deduction of tax at the time of payment only, and that such deduction is advance deduction in respect of an assessment to be made in the subsequent year It would seem therefore that the word 'receivable' must be construed as equivalent to 'received' If it is not so construed, there is no machinery to recover the tax, inasmuch as section 19 will not apply as it cannot be stated that income tax has not been deducted in accordance with the provisions of section 18 until and unless the interest itself has been actually paid The interest need not necessarily be receivable in British India It is sufficient if it accrues or arises there[21]

Income from securities—Set off—

Where a Bank or other concern engaged in business similar to that of a Bank receives deposits or loans in the course of its business and invests the money so borrowed as occasion arises it should be allowed in computing its liability to income tax to set off the entire interest on such borrowings against its entire income liable to tax No attempt should be made for example to allocate a proportion of the borrowed money to investments in tax free securities and to set off the interest on such proportion against the tax free securities instead of against the taxable income

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(21) See *Raja Bahadur Bansilal Motilal v Commissioner of Income tax Bombay* 54 Bom 460

But (as an exception to the foregoing) in the rare cases in which there is definite proof (not a mere inference) that a certain sum was specifically borrowed by a Bank or similar concern for the purpose of investment in tax free securities and has been so invested the interest on the money so borrowed should be set off against th interest on the tax free securities and not against the income liable to income tax

Assessees other than Banks or similar concerns may set off interest on money borrowed specifically for investment in taxable securities or shares, and so invested against their income liable to tax taken as a whole and not merely against the interest on such securities or the dividends on such shares In all such cases there must be clear proof and not a mere inference that the money was specifically borrowed for such investment and actually invested They cannot be allowed to set off against their income liable to tax interest on money borrowed for investment in tax free securities and so invested (*Income tax Manual*, para 26)

This concession has been given by executive orders in accordance with a promise given when the Act of 1922 was passed Under each category of income—sections 7 to 12—the law sets out what deductions may be made in arriving at the taxable income, and no deductions are contemplated in respect of interest on securities[22] Therefore, no deduction can be allowed under this head, and whatever set off may be made under section 24 can only take into account the income worked out under each head of income in accordance with the rules regulating that head of income This view is confirmed by the decision of the Madras High Court in *C I T v M Ar Ar Arunachalam Chettiar*[23] in which that Court decided that a set off as between different businesses should be made under section 10 and not under section 24 which contemplated set off only between the final result under different heads (as set out in section 6) as worked out under sections 7 to 13

The position of an assessee holding securities as an ancillary or necessary part of his business is distinguishable It is possible to hold that in such cases the interest from securities should be credited to profits and the cost of money borrowed (which in most cases could not be identified) debited to the Profit and Loss account, and the assessee taxed on his profits under section 10, the tax collected on the securities being credited to him as an advance payment of tax The position, however, is obscure The cases in which it would be possible to take up such a position with the least objection would appear to be those of

(22) *Maharaja etc Sahi v Commissioner of Income tax* C Pat 29 2 I T C 281 *Lajaiti Prasad Singh and another v Commissioner of Income tax Patna* 9 Pat 194 *Raja Bijoy Singh Dudhuria v Commissioner of Income tax Bengal* 57 C 918

(23) 1 I T C 278

Banks, but even in regard to them the Bombay High Court ruled In re *Tata Industrial Bank*[24] that the depreciation of securities could not be allowed as a loss of profits A similar view was taken by the Punjab High Court in regard to the *Punjab National Bank*[25] That is to say, the securities do not form the stock in trade or the 'circulating capital' of a Bank, but part of its fixed capital or investments But the law does not prevent the interest on money borrowed for fixed capital, *e g*, buildings or plant, being charged as a deduction necessary for earning the profits, and there is therefore similarly nothing to prevent a Bank or similar business claiming to treat the income from investments as part of the income from business and as a necessary consequence to set off the interest on money borrowed as a necessary item of expenditure to earn the profits The fact that the depreciation of the securities cannot be taken into account is no reason why the interest on sums borrowed for buying the securities should not be set off But the investments should be necessary for the business and an integral part thereof

In the *Madras Central Urban Bank Case*,[26] there are suggestions that if securities are part of the fluid assets of a Bank, the interest on such securities would form part of the profits of the Bank's business

United Kingdom Law—

In the United Kingdom, the Crown has in certain cases the right to choose under which head of income it shall tax an assessee (see notes under section 6) and the law and practice in that country do not therefore form a safe guide for interpreting the Indian law in this respect

Property

9 (1) The tax shall be payable by an assessee under the head " Property in respect of the *bona fide annual* value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of his business, subject to the following allowances, namely —

(i) where the property is in the occupation of the owner, or where it is let to a tenant and the owner has undertaken to bear the cost of repairs, a sum equal to one-sixth of such value ,

(24) 1 I T C 152
(25) 2 I T C 184
(26) 3 I T C 357

(ii) where the property is in the occupation of a tenant who has undertaken to pear the cost of repairs, the difference between such value and the rent paid by the tenant up to out not exceeding one-sixth of such value ,

(iii) the amount of any annual premium paid to insure the property against risk of damage or destruction ,

(iv) where the property is subject to a mortgage or charge or to a ground rent, the amount of any interest on such mortgage or charge or of any such ground rent ,

(v) any sums paid on account of land-revenue in respect of the property ,

(vi) in respect of collection charges, a sum not exceeding the prescribed maximum ,

(vii) in respect of vacancies, such sum as the Income-tax Officer *may determine having regard to the circumstances* of the case

Provided that the aggregate of the allowances made under this sub section shall in no case exceed the annual value

(2) for the purposes of this section, the expression "annual value shall be deemed to mean the sum for which the property might reasonably be expected to let from year to year

Provided that, where the property is in the occupation of the owner for the purposes of his own residence, such sum shall, for the purposes of this section, be deemed not to exceed ten per cent of the total income of the owner

***Rule 7.*—Under section 9 (1) (vi) of the Act, the sum to be allowed in respect of collection charges shall not exceed 6 per cent of the annual value of the property**

History—

Under the Act of 1886, income from house property was taxable under "Other income", and there was no provision in the Act as to what deductions could be made. There was also a special section (section 24) as regards occupying owners. These persons were assessed at five-sixths of the annual value of the house.

In the 1918 Act, the corresponding section covered only house property, *i.e.*, property fit for human habitation or residential purposes, and did *not* cover *other buildings or lands appurtenant* to any buildings. Under that Act, income from such buildings and all lands was brought under 'other sources'. Nor was there a proviso limiting the allowances to the 'annual value' of the property.

The change in 1922 is explained in para. 29 of the Income-tax Manual reproduced below.

United Kingdom Law—

A part of Schedule A and the relative rules in the English Act roughly correspond to this section. But the difference is so great that it is hardly worth while summarising the provisions of the English law here. Schedule A of the English Act applies not only to buildings and connected lands but to all kinds of lands (including agricultural), railways, docks, harbours, sewers of local authorities, embankments, mines, collieries, etc. The detailed provisions in the English law, therefore, are useless for construing this section of the Indian Act. *Also, even in respect* of buildings, the English Act applies to premises used for the *owner's business. In this respect it is somewhat like the* Indian Act of 1918.

Property and business—

See In re *Kaladan Suratee Bazar*[26a] [under section 2 (4)] and *Mangalagiri Factory case*[27] [under section 10 (2) (*vi*)]. The computation of income from property should be calculated under section 9, and not under section 10. Income derived from 'property' is a specific category, and the mere fact that the owner of a 'property' is a company will not make the income one derived from 'business'.[28] Income from leasing land and erecting stables thereon is income from 'other sources' and not from 'property'. [In re *Basantrai Takhat Singh. (Allahabad)*].

Property—

[*Section* 9].—The tax is payable under this head in respect of property consisting of any building or, *lands appurtenant to a building*

(26a) 1 I.T.R. 50.
(27) 97 I C 850, 2 I.T.C. 251
(28) In re *Commercial Properties, Ltd*, 2 I T C 23

by the owner of such property Lands not attached to a building are not chargeable under this section The income derived from vacant lands let out in urban areas for the purpose e g, of storing material is chargeable to the tax under section 12

Buildings or lands occupied by the owner thereof for the purposes of his own business are not liable to the tax under this head This particular provision was inserted in order to avoid the unnecessary complications in previous Acts under which the annual value of such property was liable to the tax under this head and a corresponding deduction was allowed to the owner under the head business (section 10)

It is to be noted that it is only the owner who is liable to pay tax under this head Where a person derives an income from house property which he holds on lease such income is chargeable under section 12— ther sources (*Income tax Manual* para 29)

Property—Definition of annual value—

[*Section* 9 (2)] —The tax is under the head property chargeable in respect not of any actual rental or ca h received but of the *bona fide* annual value The *bona fide* annual value of a building is the full market value at which the building could be let from year to year irrespective of any charges by way of municipal rates or taxes thereon It therefore differs from the actual annual rent payable on a long term lease or the actual rent payable on a yearly lease under a privileged rental or with tenant s liability to pay owner s rates or taxes The only limitation on taking the full market value is that in cases where the property is in the occupation of the owner for the purposes of his own residence the annual value is restricted to a maximum of 10 per cent of the total income of the owner The phrase total income in this definition has the meaning given to it in section 2 (15) of the Act ie income profits and gains of such owner from all sources to which the Act applies and therefor does not includ income derived from any of the sources specified in section 4 (3 of th Act (such a for example agricultural income) which are exempt from the tax (*Income tax Man al* para 30)

'Annual Value —Property occupied by owner—

In reckoning total income under section 16 the annual value of the house which the owner himself occupies should not exceed 10 per cent of the total income By annual value here is clearly meant *gross* annual value before making the various deductions permitted under section 9 (1) and not the *nett* annual value after these deductions have been made

Bona fide annual value—

The words *Bona fide* are otio e the expression 'annual value' having been defined by sub section (2) *Bona fide* merely repeats the idea of the word 'reasonably in that sub section A decision on *bona fide*' or 'reasonable' value is neces

sarily a decision on a pure question of fact, see *Gour's case*.[28a] The material evidence of the annual value in any year is the rent payable in that year but that is not conclusive, and the true annual value is a question of fact to be determined with reference to all the circumstances of each case. See *Sooratee Bazaar, Ltd. v. Commissioner of Income-tax, Burma.*

Reasonably—

"It would be unreasonable to expect an exact definition of the word. Reason varies in its conclusions according to the idiosyncracy of the individual, and times and circumstances in which he thinks The reasoning which built up the old scholastic logic, sounds now like the jingling of a child's toy But mankind must be satisfied with the reasonableness within reach, and in cases not covered by authority, the verdict of a jury (or the decision of Judge sitting as a jury) usually determines what is reasonable in each particular case, but frequently reasonableness 'belongeth to the knowledge of the law', and therefore to be decided by the justices " (Co Lete 56 B)—

Under the English Acts, there are elaborate rules regarding the ascertainment of 'annual value', but these are of no assistance in interpreting the Indian law. Reference however may be made to cases of rating, the general principles of which will presumably apply to valuations for income-tax purposes also. That is, the Income-tax Officer should value the property with due regard to the environment, the nature of the building, its amenities both internal and external, and so forth, and not merely with reference to its bare ground and its four walls and the roof. See *L C C v Erith Churchwardens*;[29] *Mersy Docks and Harbour Board v Birkenhead Assessment Committee*[30]; *Kirby v. Hanslet Union Assessment Committee*[31], all rating cases.

"Whatever is fixed to the realty so as to pass landlord's fixtures in a demise of the premises must be taken to be part of the premises for the purpose of ascertaining its rateable value."—Per *Blackburn, J.* in *Childley v West House*[32]

"Things which are on the premises to be rated, and which are there for the purpose of making, and which make the premises fit as premises for the particular purpose for which they are used, are to be taken into account in ascertaining the rateable value of such premises...........It seems to me that when things are brought into that category they would pass by a demise of premises as such between landlord and tenant."—Per *Lord Esher, M. R.*, in *Tyne Boiler Works v. Tynemouth*[33]

(28-a) 3 I T C 33
(29) (1893) A C 562
(30) (1901) A C 175
(31) (1906) A C 43
(32) (1874) 32 L T. 486
(33) (1896) 18 Q B D 81

See also the following cases —*Stock* v *Sulley* infra, and *Gundry* v *Dunham* set out under section 23

Under the United Kingdom law, insurance premia paid on property cannot be deducted in full in all cases, and an attempt was therefore sought to be made in *Turner* v *Carlton*[34] in which the lessor agreed to pay the insurance premium, to deduct this premium from the rent before ascertaining the annual value The case was thrown out on other grounds, but Channell, J, incidentally expressed the opinion that the deduction was not admissible This case, however, cannot apply in India, where under section 9 (1) (*iii*), the annual premium paid for insurance against damage or destruction can be deducted so long as the total deductions do not exceed the annual value

Evidence of municipal valuations—

Though the annual value is a question of fact entirely for the Income-tax Officer to decide, the value adopted by local bodies for rating purposes would have a high evidential value See *Gundry* v *Dunham* set out under section 23, but the municipal valuation would not bind the Income-tax Officer

"Annual value is but an hypothetical sum arrived at in a certain manner "—Per *Buckley, L J*

It is 'not an actual but an hypothetical sum —Per *Kennedy L J*, in *R* v *Special Commissioners* ex parte *Essex Hall*[35]

In the words of the English Poor Law statutes, it is the "rent at which hereditament might reasonably be expected to be let from year to year free of all usual tenant's rates and taxes and to the commutations, tenth charge if any "

Annual value—Evidence—Lease—Not conclusive—

A mother granted to her son a lease of a public house at a rent of £19 10s, such lease dated 2nd May, 1898, being in continuation of one dated July, 1889 The Commissioners considered that they were not bound to accept either lease in the circumstances as conclusive evidence of the annual value of the premises, and fixed such value at £40 The Court affirmed the determination of the Commissioners[36]

Annual value—Cannot be negative—

If the interest payable exceeds the annual value of the property, the excess cannot apparently be claimed as a business expense for example under section 10 (2) if say, a company owns property While section 24 no doubt permits an

(34) 5 Tax Cases 395

(35) 5 Tax Cases 636

(36) *Stocks* v *Sulley* 4 Tax Cases 98

assessee to set-off losses under one source of income against profits under another, it is clear from the proviso to section 9 (1) that the law does not contemplate the possibility of the income from house property being ever a negative figure.

Deductions allowed in respect of property—

It is to be particularly noted that no deductions are permissible on account of any municipal or local rates or taxes in respect of property. Nor can any allowance be made for brokerage for raising loans on mortgages and legal charges relating thereto, since such charges are in the nature of capital charges The only deductions from the "annual value" permissible are those specified in section 9 (1) Where an assessee is the owner of several items of property within the meaning of section 9 (1), the allowance admissible under that section should be worked out with reference to the annual valuation of the property taken as a whole and not item by item

Ordinarily, no expenditure is allowed as a deduction in calculating income for the purpose of the Act except such expenditure as has been incurred solely for the purpose of earning that income Under clause (*iv*) of sub section (1) of section 9, there is no such restriction, so that a property owner is entitled to set off, against the annual value of property, the interest payable on a mortgage or other charge upon the property irrespective of the purpose for which the encumbrance was created

The proviso to sub section (1) of section 9 has no application to interest on money borrowed for business purposes even *though such* money may have been borrowed on the security of the assessee's property (*Income tax Manual*, para 31)

Proof of expenditure where deductions are claimed in respect of "property"—

The allowance on account of repairs, [*viz*, one sixth of the annual value in the case specified in clause (*i*), and in the case specified in sub clause (*ii*), the amount permitted by that clause] is a fixed allowance which should be granted without proof of the actual expenditure in any year and irrespective of the amount of such expenditure It should also be allowed in full even when an allowance is given for "vacancy" under section 9 (1) (*vii*) The allowances on account of the annual premium paid to insure the property against risk of damage or destruction or on account of annual charge or ground rent or land revenue or of collection charges must be supported by proof of the actual expenditure Interest that has fallen due on a mortgage should, however, be allowed as a deduction even though it may not have been actually paid. (*Income tax Manual*, para 32)

Land—

Would evidently include ponds, etc, if they are 'appurtenant' to the buildings 'Appurtenant' means usually enjoyed

with or occupied with—see *Bayley* v *G W Railway*,[37 38] *Ongley* v *Chambers*[39] (Stroud)

'Building —

What is a building is a question of degree and circumstance its ordinary and usual meaning is a block of brick or stone work covered by a roof '—per *Lord Esher M R* in *Moir* v *Williams*[40]

In restrictive covenants, various questions may arise as to what constitutes a 'building', but for the purpose of Income tax, the word must obviously be construed in the sense of a structure possessing "annual value' It would therefore include docks, wharves, bridges and the like

Of which he is the owner —

Should evidently be construed as of which he was the owner *during the previous year*, the previous year being understood of course with reference to section 2 (11) The present tense in 'is' has no specific reference to the point of time at which the tax is assessed Section 9 is primarily a section of computation the liability to tax being determined by sections 3 and 4 The liability to tax will therefore not cease merely because since the close of the previous year' the assessee has ceased to own the property[41]

Owner—

It must be presumed that the Legislature was aware that the expressions owner ownership and the verb to own in its various tenses have been frequently used in Acts of a similar nature and further that they can be and are used in various meanings in different Acts in some of which they have been specially defined for the purposes of particular sections Nevertheless the expression has not been defined for the purposes of this Act It may have the narrow and technical meaning of the full ultimate and legal owner but if this was intended it could easily have been expressed and the failure to do so points to it not having been so intended [42]

In *Eglington* v *Norman*[43] the expression was defined as

The person in whom (with his or her assent) it (the property) is for the time being beneficially vested and who has the occupation or control or usufruct of it *e g* a lessee is during the term the owner of the property demised

But in the context in section 9 here, a distinction is implied between an 'owner' and a 'tenant' and though a person may be

(37 38) 26 C L D 434

(39) (1894) 8 Moore C.P 665

(40) (1892) 1 Q B 264

(41) *Behari lal Mullick* v *Commissioner of Income tax* 2 I T C 398

(42) *The Burma Railways Company* v *The Secretary of State for India* 1 I T C 140

(43) 46 L.J Q.B 559

owner in relation to his tenants while being a tenant himself in relation to the owner (or a superior tenant), it would appear from the general structure of the section—which merely contemplates the taxation of the annual value (subject to certain deductions)—that it is intended to tax only one person that is, the ultimate owner The appropriate arrangement is therefore to tax only the ultimate owner as the owner under section 9, and to tax the intermediate tenants as receiving income from 'other sources' under section 12—if the circumstances are such that the intermediate persons cannot be taxed under section 10 (Business) See dicta in *Gooptu Estates Ltd (Calcutta)* [43a]

Limited ownership—Taxable—

There may be cases as for instance the case of a person who receives an allowance from his father where the sum is certainly not assessable under any clause of the Income tax Act and yet it represents income which the man is free to expend as he pleases And conversely there are such cases as that of a person who has a life rent of a house under a trust or settlement which he is by the terms of the deed precluded from letting There again his right is not value in money because he cannot let it and yet he could undoubtedly be subject to assessment under schedule A and without relief from any other party Per *Lord McLaren* in *Corke v Fry* [44]

The first half of Lord McLaren s dictum is of doubtful applicability to India—*see* notes under section 4 (3) (*vii*)—Casual income—but the second half is evidently applicable *There is* nothing to prevent the owner of a limited interest in property being taxed under section 9 *See also* notes under section 40 as to the taxation of trustees

Repairs—

[*Section* 9 (1) (*i*)] —The allowance to be made on account of repairs has nothing to do with the period for which the house has been occupied The allowance is also a fixed sum namely, one sixth of the annual value and it can neither be reduced nor increased by the Income tax Officer Similarly, under clause (*ii*) of section 9 (1) where the tenant has undertaken to bear the cost of repairs the allowance is also a fixed amount, being the difference between the annual value of the house and the rent paid by the tenant subject to a maximum of one sixth of the annual value

In the United Kingdom, only the actual cost of the repairs is allowed

(43a) 5 C 910
(44) 3 Tax Cases 335

Property—Insurance deductions—

[*Section* 9 (1) (*iii*)] —The only insurance deduction permissible is the amount of the annual premium paid to insure the property against risk of damage or destruction In some cases owners insure against loss of rent Where an owner asks for an allowance on account of the annual premium for such insurance it should be allowed if such owner agrees to pay tax on any amount recovered from the insurance company Where no such allowance is claimed or allowed tax is not to be charged on the amount recovered from the insurance company (*Income tax Manual*, para 33)

Annual premium—

It is not usual to enter into contracts for fire, etc , insurance for long periods, but if a person entered into such a contract and paid a lump sum premium for a longer period than one year, only the premium for one year could be deducted from the income See however the meaning of the word 'annual' in annual profits discussed by Rowlatt, J , in *Ryall* v *Hoare*[45], also see sections 10 (2) (*iv*) and 15 in which the word 'annual' does not appear The omission of the word "annual" in S 10 (2) (*iv*) is probably accidental

Damage or destruction—

From any cause whatever, *e g* fire, earthquake, lightning or civil commotion 'Damage' means a partial injury to the property whereas 'destruction' is complete damage

Insurance against loss of rent is not covered by the law, and the provision in paragraph 33 of the Income tax Manual is *ex gratia*

Mortgage, ground rent etc —

[*Section* 9 (1) (*ii*)] —The question arises, under this clause of the sub section, whether, when the property is subjected to a mortgage or charge, the amount of interest to be allowed as a deduction should be the interest that has accrued, or the interest that has been actually paid during the year In respect of premiums paid for insurance or on account of land revenue, the word 'paid' has been used in clauses (*ii*) and (*i*), and it would seem, from the absence of the word 'paid' in clause (*ii*), that a charge or interest on mortgage may be deducted when it has *accrued*—even if it has not been paid [46]

The words in this section do not cover a charge on the income of property in favour of a person if such a charge rests not on the property alone but on other assets of the assessee as

(45) 8 Tax Cases 521

(46) *Beharilal Mullick* v *Commissioner of Income tax*, 54 Cal 636 2 I T C 398

well Further, merely because a charge can be enforced if necessary by resort to the corpus, it would not be correct to treat the charge as one on the corpus

A mere deposit of title deeds will not, except in the towns mentioned in section 59 of the Transfer of Property Act, amount to the creation of a charge on the properties to which the deeds relate [In re *Basantrai Takhat Singh*, (*Allahabad*)]

As the section stands, there is nothing to prevent an assessee, who has borrowed money for business purposes by a mortgage upon his property, from claiming the interest as a deduction under this clause The purpose for which the mortgage or charge was created is irrelevant

The framers of the Act presumably followed the English practice, and proceeded under the assumption that ordinarily property in India is either bought or built with capital borrowed by a mortgage of the property They have also overlooked the fact that under the English law all assessees can shift the tax on interest on loans, for whatever purpose raised, to the lenders The result therefore has been to place the owners of 'property' in India in a more favourable position than other classes of assessees

Property—Collection charges—

[*Section* 9 (1) (*ii*)] —As regards collection charges, Rule 7 fixes 6 per cent of the annual value of the maximum amount permissible Where a house has remained vacant for a period, this maximum of course would never be reached and in many cases there will be no collection charges The *maximum* amount permissible should be reduced in all cases where a house has remained vacant for a period to 6 per cent of the annual value as diminished by the amount allowed in respect of vacancies Proof must always be given of the collection charges having been incurred Rule 7 simply provides that, where there is proof of collection charges such charges may be allowed subject to the provision that in no case shall the amount allowed on account of collection charges exceed 6 per cent of the annual value Legal expenses incurred in recovering rents from tenants should be treated as a permissible deduction included in collection charges subject to the following conditions — (*a*) Only net legal expenses that is expenses after deducting any costs recovered from the opposite party will be deducted (*b*) The actual expenses incurred in excess of the costs deducted will be allowed in the year in which the decree is passed, a further allowance for costs proved to be irrecoverable will be given later, if necessary (*c*) The total allowance for collection charges including legal expenses allowed must of course not exceed the statutory 6 per cent (*Income tax Manual*, para 34)

No collection charges can be allowed in respect of property occupied by the owner Under this clause notional expenditure cannot be claimed [47]

Property—Allowance in respect of vacancies—

[*Section* 9 (1), (*vii*)] —No fixed rule can be laid down regarding the allowance to be granted in respect of vacancies under clause (*vii*). Property is taxed on the "annual value" which, as noted above, is the commercial rent of a house—the rent which it would fetch if let by the year. Where the property is let at an annual rental corresponding to the annual value it would be fair to allow a proportionate deduction corresponding to the period of the vacancy, that is, if it were vacant for half the year, half the annual value might be allowed Property may be let on short lease for a period less than one year, and fetch a rent for that period far in excess of what has been fixed as the "annual value," and in such cases no allowance obviously can be given Where a claim is made on account of vacancies, the owner should be asked to state what the actual rental was that he had received for the period of the year during which the property was let, and the amount allowed on account of vacancies should, under no circumstances exceed the amount by which the rent received falls short of the annual value There can, of course, be no allowance in connection with any property which is reserved by the owner for his private occupation A claim on account of vacancies can only be entertained in connection with property that is usually let (*Income tax Manual,* para 35)

As regards the scope of the sub section, see Coutts Trotter, C J, in In re *Sri Krishna Chandra Gajapati Narayana Deo* [48]

' The manual says outright that the sub section only applies to property which is usually let to a tenant We do not think it necessary to decide whether that is correct or not and whether a man who had a house that he never let but who dismantled it and locked it up for the year would or would not be assessable "

Under Rule 4, No VII, Schedule A of the English Act, a vacant house is automatically exempt for the period of vacancy

As to what constitutes 'vacancy'—the expression used in the English Act being 'unoccupied'—there are no decisions under the Income tax Acts In *Queen* v *The Assessment Committee of St Pancras*[49], which was a rating case, it was held that the test of occupancy was not actual habitation of residence but the state of the house which permits of its being inhabited or resided in at any time

Per *Lush, J* — 'If, however he (the owner) furnishes it (the house) and keeps it ready for habitation whenever he pleases to go out, he is an occupier though he may not reside in it one day in a year "

(47) *Maharajadhiraj of Darbhanga* v *Commissioner of Income tax Bihar and Orissa* unreported

(48) 2 I T C 104

(49) (1877) 2 Q B D 581

Again, under the Inhabited House Duty Act, the same question was raised in *Smith v Dauney*[50] In this case the assessee paid the income tax on the property under Schedule A but disputed the liability to Inhabited House Duty It was held that the words 'habited' and 'occupied' meant the same thing, and that the house in question which was furnished ready for use, was assessable to the Inhabited House Duty, even though it was not dwelt in or slept in by any person during the year in question

In the case of *Sri Krishna Chandra Gajapati Narayana Deo*[1] the Madras High Court held—

Per *Coutts Trotter, C J*—"If a man owns a house ready for his own occupation, ready for him to live in when he chooses to do so he is assessable "

The Court followed *R v St Pancras Committee*

A house occupied by the owner *i e*, kept in such a manner that he can enter into residence at any time, and not let is not vacant unless dismantled and shut up The contrasting terms are more appropriately 'user' and 'non user', rather than 'occupation' and 'vacancy' The provision in section 9 (1) (*vi*) is meant for let houses It was held therefore in *Maharajadhiraj of Darbhanga v Commissioner of Income tax Bihar and Orissa*, that the owner of a house who occupies it himself and keeps it as a guest house cannot claim an allowance for vacancies on the ground that no one resided in the house

The allowance made for vacancies does not affect the allowances under the other clauses of this sub section, and it would not be right for the Income tax Officer to take into account the allowances made under the other clauses, when he has to fix a deduction on account of vacancies

Unrealised rent—

Under a notification under section 60, unrealised rent is exempt and also excluded from total income if (*a*) the tenancy is *bona fide*, (*b*) the defaulting tenant has vacated, or steps have been taken to compel him to vacate the property; (*c*) he is not in occupation of other property of the assessee, and (*d*) the assessee has taken all reasonable steps to institute legal proceedings for the recovery of the unpaid rent All these conditions have been imposed to prevent collusive claims

Other deductions inadmissible—

No other deductions can be permitted beyond those set out in sub section (1) Thus, expenses incidental to the raising of

(50) 5 Tax Cases 25

(1) 2 I T C 104

a loan or mortgage, local rates or taxes, expenditure on structural alterations, depreciation whether on the building or on its furniture or fittings, cannot be allowed as deductions In *Nawab Akbar Khan's case*,[2] the Lahore High Court held that owner's taxes paid to a local authority cannot be deducted from the annual value of property under this section but in *Chunna Mal Saligram's Case*,[3] another bench of the same Court took the contrary view In the United Kingdom various deductions are allowed, *e g*, expenditure on embankments, drainage, etc, but such allowances cannot be made under the Indian Act

Tenant's taxes—

Annual value should evidently be based on the assumption that the tenant pays the municipal and other taxes that under the local law or custom he is expected to pay Where therefore as a matter of convenience the landlord pays the occupier's taxes, and includes them in the rent, the annual value should be based on the net rent and not the gross

See also *Wylie* v *Eccott*[4] set out under section 10

Property—Limitation of total allowance—

[*Section* 9 (1)] —The proviso to section 9 (1) that the aggregate of the allowances made under that sub section shall in no case exceed the annual value was inserted owing to the new provision in section 24 providing for the set-off of losses under one head against income, profits or gains under any other head Instances have occurred of buildings situated in extensive grounds or on valuable sites being mortgaged for sums the interest on which is far in excess of the ' annual value The result of this proviso is that the annual value of the property belonging to an assessee can in no case be reduced to a *minus* sum owing to the allowances, and that there can be no loss under this head to be set against income, profits or gains under any other head (*Income tax Manual*, para 36)

Set-off between one property and another—

Section 9 does not contemplate the computation of income with reference to each separate building or group of buildings but only with reference to the assessee's taxed property as a whole An assessee is therefore entitled to set off the excess of the allowances permitted in clauses (*i*) to (*iii*) of sub section (1) over the annual value of a particular building or buildings, against the income from other buildings of which he is the owner

Proviso—Effect of—

An important effect of the proviso under sub section (2) is that if the taxable income is only from property, no tax can be levied The result of this proviso is to place the landed

(2) 3 I T C 344
(3) 3 I T C 465
(4) 6 Tax Cases 128

interests at a considerable advantage A rich zemindar owning a lot of landed property but with not much income from non agricultural sources, will be very lightly taxed in respect of his house property, whereas a person with equal or possibly less aggregate income from non agricultural sources, would be taxed very much more heavily in respect of his house property This however, is part of the anomalies inevitable in a system of taxation that excludes an important source of income like agriculture

Method of accounting under this section—

There is no provision in section 9, as in sections 10 to 12, contemplating maintenance of accounts by the assessee alternatively on the 'mercantile' or some other system, but this is not a matter of any practical importance

Business **10** (1) The tax shall be payable by an assessee under the head "Business in respect of the profits or gains of any business carried on by him

(2) Such profits or gains shall be computed after making the following allowances, namely —

[*For Sub clauses see later*]

(3) In sub-section (2), the word "paid means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under this section

Previous law—

In the Act before 1918, there were no provisions as to the method of computing income from business, the subject being governed by rules and executive instructions The provisions introduced in 1918 are much the same as at present, and the detailed changes are set out in the notes under each clause of sub section (2) Sub section (3), appeared in 1922 along with section 13

United Kingdom Law—

This section roughly corresponds to a part of Schedule D and the Rules thereunder, as well as some of the General Rules

Sub section (1)—Assessee—

See notes under section 24 and the case of *M Ar Arunachalam Chettiar*[5] as regards the position of a partner in a firm carrying on business

(5) 1 I T C 2?8

Business—

See notes under sections 2 (4) (Business), 3 (Capital and Income and Mutual Concerns and Destination of Profits), 4 (3) (i) and (ii) (Charities), and 4 (3) (iii) (Casual Profits)

Carried on—

Implies a repetition of acts, but as to whether any such repetition is necessary, see the rulings set out under sections 2 (4), 3 and 4 (3) (iii) referred to above 'Carry on' implies a repetition or series of acts[6] To carry on a business means primarily to carry on one's own business, therefore a salaried clerk does not 'carry on' business at the office of his employer[7] A clerk in the Admiralty, for example, does not 'carry on business' at his office[8]

As to the difference between 'trade exercised in the country' or 'business carried on in the country' on the one hand and 'business connection' on the other, see notes under sections 4 (1) and 42 (1)

Profits—

There is no definition of 'Profits or gains' All that is stated in this section is that certain deductions alone are permitted in computing profits, and that the deductions would depend on the method of accounting adopted by the assessee The section assumes that gross profit has been arrived at somehow The gross profit will depend on the method of accounting in regard to Receipts, the exclusion of Receipts on Fixed Capital Accounts, the valuation of stocks, etc In regard to these matters it would appear that, in the absence of any statutory provisions, the accepted principles and practice of commercial usage and accountancy should be followed, and that the accounts should represent facts with truth and accuracy See notes under section 13

The question whether the deductions set out in sub section (2) are exhaustive or not has been answered differently by the different High Courts

'*Profits mean chargeable income and must be computed from the* gross income after allowing for the sums paid and debited as detailed in sub section (2)

The assessing officer is not bound to allow any deduction for sums paid or debited other than those properly paid and debited as detailed in sub section (2)

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(6) Per *Brett L J* in *Smith v Anderson* 50 L J Ch 5[?]

(7) *Lewis v Graham* 20 Q B D 784

(8) *Buckley v Harrow*, 19 L J Ex 151

Profits do not mean commercial profits but chargeable income —Per *Macleod C J* in In re *The Tata Industrial Bank Ltd*[9]

The Collector is not bound to make any other allowance [than those set out in section 10 (2)] in favour of the party nor is the party entitled thereto as of right —Per *Shah J* (*ibid*)

In view of the fact that for the purpose of income tax assessees have a right to be dealt with according to their own method of accounting I desire to guard myself from assuming that section 10 (2) is intended to be an exhaustive list of deductions which are permissible for the purpose of income tax —Per *Rankin C J* in *Howrah Amta Ry Co v Commissioner of Income tax*[10]

Per *Mullick J* in In re *Raja Jyoti Prasad Singh Deo*[11] clause 2 of section 11 (now section 12) is exhaustive

In *S P S Ramaswami Chettiar v Commissioner of Income-tax Madras*[1] both Curgenven and Anantakrishna Ayyar JJ observed that the deductions detailed in sub section (2) are not exhaustive and that all deductions permitted in commercial usage *e g* Bad Debts should be allowed

Several businesses—

Any business means each and every' business Therefore, if the assessee carries on several businesses the profits of each business should be calculated under this section and added together before any set off is given under section 24 That section allows set off between different *heads* of income as described in section 6 Within the *same* head of income, set off is automatically admissible—see *M Ar Arunachalam Chettiar s case*[13] and also the notes under the proviso to sub section (1) of section 9

Profits from foreign business—

See notes under section 4 (2) regarding the circumstances in which foreign profits may be taxed in British India and the method of computing such profits

United Kingdom Law—

The following dicta of Judges give the position under the United Kingdom law which is practically the same as in India though in form the law in the United Kingdom differs mentioning as it does the prohibited deductions only See also the dicta set out under section 3, as to what is 'income, profits or gains'

(9) 1 I T C 152 46 Bom 56
(10) 2 I T C 504
(11) 1 I T C 103
(12) 53 M 904 59 M L J 403 (S B)
(13) 1 I T C 2 8

"What a trader receives is a trading receipt, not a profit The latter involves deductions on account of expenditure, adjustment on account of stocks, etc" See per *Rowlatt, J* and *Lawrence, L J* in *Short Bros* v. *Inland Revenue*[14]

"The profits and gains of any transaction in the nature of a sale must, in the ordinary sense, consist of the excess of the price which the vendor obtains on sale over what it cost him to procure and sell, or produce and sell, the article vended, and part of that cost may consist of the sum he pays for the hire of a machine, or the services of persons employed to produce, procure or sell the article

" . The words 'profits and gains' are, where the context does not otherwise require, to be construed in their ordinary signification I can see no reason for suggesting that this last mentioned principle should not apply to the word "Capital" when used in these statutes, that it too, where the context does not otherwise require, should be construed in its ordinary sense and meaning"—Per *Lord Atkinson* in *Scottish North American Trust* v *Farmer*[15]

" . The profit of the concern surely would be all the net proceeds of the concern after deducting the necessary outgoings without which those proceeds could not be earned or received"—Per *the Lord Chancellor* in *Mersey Docks* v *Lucas*[16]

"Profit is the difference between the price received for goods sold and the cost"—Per *M R Jessel* and *Brett, L J* in *Erichsen* v *Last*[17]

Now, profits may be taken here to mean the surplus of income after defraying all, at least necessary expenses of making it"—Per *Day, J* in *Last* v *London Assurance Corporation*[18]

"The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning these receipts"—Per *Lord Herschell* in *Russell* v *Aberdeen Bank*.[19]

"'Profits' I read on authority, to be the whole of the incomings of a concern after deducting the whole of the expenses of earning them, that is what is gained by the trade"—Per *Lord Fitzgerald* (*ibid*)

"It cannot of course be denied that, as a matter of business profits are ascertained by setting against the income earned the cost of earning it, nor that as a general rule for the purpose of assessment to the income-tax profits are to be ascertained in the same way Unless the context requires a different meaning, or the words appear to be used throughout the Act in another sense, I think that they (the words 'profits or gains') must be construed according to their ordinary signification When we speak of the profits and gains of a trade we mean that which he has made by his trading Whether there be such a thing as profit or gain can only be ascertained by setting against the receipts

(14) 12 Tax Cases 955
(15) 5 Tax Cases 705
(16) 2 Tax Cases 28
(17) 4 Tax Cases 424, 426
(18) 2 Tax Cases 115
(19) 2 Tax Cases 327.

the expenditure or obligations to which they have given rise "—Per *Lord Herschell* in *Gresham Life Assurance Society* v *Styles*[20]

"The word 'profits,' I think is to be understood in its natural and proper sense—in a sense which no commercial man would misunderstand "—Per *Lord Halsbury* (*ibid*)

"We must go by the words of the Act of Parliament, and we must not allow any item in favour of the person who is taxed, merely because it is an item which would probably find its way into a loss and profit account between a man and his partners or kept for himself There are a great many things that a prudent trader might treat as deductions because he wished to make a fund to provide against future accidents and things of that kind which are not dealt with at all by the Income tax Acts '—Per *Baron Pollock* in *Rhymney Iron Co* v *Fowler*[21]

" In making out the balance sheet to show what profit a trader has made under Schedule D, it is not to be worked out in the same way that the trader would make out his balance sheet for his own information showing what profit or loss he has made "—Per *Smith, J* in *Gillatt and Watts* v *Colquhoun*[22]

' As little are they bound as the Income tax Commissioners are bound to take the balance sheet of the company as the true measure of the income ' —Per *the Lord President* in *Edinburgh Southern Cemetery* v *Kinmont*[23]

"But it is a very different question that is raised here as to whether, though that may be a very proper operation in a trader's balance sheet, the sums which are received and which are proposed to be applied to redemption of capital can be properly regarded as profits under the Income tax Acts The profits in a proper trader's balance are a very different thing from profits as these have been defined under the provisions of the statute ' —Per *Lord Shand* (*ibid*)

' But the statute refuses to take an ordinary balance sheet or the net profits thereby ascertained as the measure of the assessment and requires the full balance of profits without allowing any deduction except for working expenses and without regard to the state of the capital account or to the amount of capital employed in the concern or sunk and exhausted or withdrawn "—Per *the Lord President* in *Collness Iron Co* v *Black*[24]

"It is plain that the question of what is or is not profit or gain must primarily be one of fact, and to be ascertained by the tests applied in ordinary business Questions of law can only arise when some express statutory direction applies and excludes ordinary commercial practice or where by reason of its being impracticable to ascertain

(20) 3 Tax Cases 193
(21) 3 Tax Cases 479
(22) 2 Tax Cases 84
(23) 2 Tax Cases 525
(24) 1 Tax Cases 308

the facts sufficiently, some presumption has to be invoked to fill up the gap "—Per *Lord Haldane* in *Sun Insurance* v *Clark* [25]

"In determining the amount assessable to the tax, deductions are to be made from the gross profits of all the expenses incurred by the owner for the time being for the purpose of earning the profits This indeed is involved in the very idea of profits "—Per *Lord Finlay* in *John Smith and Son* v *Moore* [26]

" The law *does not permit* *all deductions* which a prudent trader would make in ascertaining his own profits '—Per *Stirling, L J* in *The Alianza Co* v *Bell* [27]

"The phrase capital exhausted' does not occur anywhere in the Income tax Acts It is taken from a passage in Mr McCulloch on Political Economy where he says 'profits must not be confounded with the produce of industry primarily received by the capitalist They really consist of the produce on its value remaining to those who employ their capital in an industrial undertaking after all their necessary payments have been deducted and after the capital wasted and used in the under taking has been replaced If the produce derived from an undertaking after defraying the necessary outlay be insufficient to replace the capital exhausted, a loss has been incurred if the capital (?) is merely sufficient to replace the capital exhausted, there is no loss but there is no annual profit, and the greater the surplus is the greater the profit ' I do not feel at all inclined to dispute the sufficiency of this definition But that is certainly not the scheme of the income tax —Per *Lord Blackburn* in *Coltness Iron Co* v *Black* [28]

"You must find new money in order to pay the expenses year by year, but then you do find money to pay the expenses year by year, and you get the receipts year by year and the difference between the expenses necessary to earn the receipts of the year and the receipts of the year, are the profits of the business for the purposes of the income tax '—Per *M R Esher* in *City of London Contract Corporation* v *Styles* [29]

Of course the learned Master of the Rolls (Esher) does not mean there (in the above quotation) by receipts, money which is actually received, he means debts which you will receive and which therefore on their face value require an allowance for bad debts —Per *Sterndale, M R* in *Hall & Co* v *Commissioners of Inland Revenue* [30]

"Now in the case of a trade, it is well established that this balance (of profits and gains) is *prima facie* to be ascertained by deducting from the receipts of the trade the expenditure necessary to earn them Until this has been done it is impossible to determine whether there has been any balance of profits at all *However deductions which on*

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(25) 6 Tax Cases 59
(26) (1921) 2 A C 13 1? Tax Cases 266
(27) 5 Tax Cases 71
(28) 1 Tax Cases 315
(29) 2 Tax Cases 239
(30) 12 Tax Cases 382

ordinary practice and principles might be deducted, are restricted (by Rules)' —Per *Lord Atkinson in Usher's Case*[31]

'There can be no doubt that in the natural and ordinary meaning of language the income of a bank or trade for any given year would be understood to be the gain, if any, resulting from the balance of the profits and losses of the business in that year That alone is the income which a commercial business produces and the proprietor can receive from it —Per the *Privy Council in Lawless v Sullivan*,[32]

a case from New Brunswick, Canada, in which the Crown contended with success in the Lower Courts that gains only should be taken into account, the losses being ignored, in computing the income of an assessee The Privy Council who overruled the decision of the Canadian Supreme Court held that there was nothing in the taxing Act of New Brunswick which would justify the word 'income' being construed in any other sense than the natural one which is as quoted above

The balance of the profits or gains of a trade is struck by setting against the receipts all expenditure incidental to the trade which is necessary to earn them and by applying in the computation the ordinary principles of commercial trading In the present case the Commissioners have found that the possession and employment of the tied houses are necessary to enable the appellants to earn the profits on which they pay income tax I think it follows that expenditure reasonably incurred on or in connection with such house is an expenditure incidental to the trade and necessary to earn the profits taxed and would be set against the receipts of the trade in an ordinary commercial balance sheet No auditor could properly pass a balance sheet unless such a deduction had been made I agree, therefore, that unless there are subsequent statutory limitations disallowing the deductions or any of them, the deductions must be included in the balance sheet and set against the receipts of the trade and that unless this is done the balance of profits or gains cannot be accurately computed —Per *Lord Parmoor*[33]

The expression balance of profits and gains' implies as has often been pointed out, something in the nature of a credit and debit account in which the receipts appear on one side and the costs and expenditure necessary for earning these receipts on the other side Indeed without such account it would be impossible to ascertain whether there were really any profits on which the tax could be assessed But the Rule proceeds to provide that the duty shall be assessed, charged and paid without other deductions than is hereinafter allowed" The difficulty is that nowhere in the Act is there any express allowance or enumeration of deductions, the scheme of the Act being to prohibit certain deductions with certain exceptions It has been suggested that the difficulty can be overcome by treating the exceptions from the prohibitions as impliedly allowed deductions The better view however appears to be that where

(31) 6 Tax Cases 399
(32) (1881) 6 A C 373
(33) *Usher v Wiltshire Brewery v Bruce*, 6 Tax Cases 399

a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains it ought to be allowed provided there is no prohibition against such an allowance in any of the Rules applicable to the case, and the decision of your Lordships House in *Russell v The Town and County Bank* [34] and the speech of Lord Halsbury in *Gresham Life Assurance Society v Styles*[35] clearly proceeded on this footing '— Per *Lord Parker* (*ibid*)

"The questions of law raised are and are only, whether on the construction of the Act, the deductions in debate through ' disbursements or expenses being money wholly and exclusively laid out or expended for the purposes of the trade ' (i e, the brewer's trade) are nevertheless forbidden If a subject engaged in trade were taxed simply upon "the full amount of the balance of profits or gains of such trade" there can be no doubt that upon the facts found in this special case, he would be entitled to deduct all the items which are now in debate before arriving at the sum to be charged To do otherwise would neither be to arrive at the balance between two sets of figures a credit and a debit set which balance is the profit of the trade nor to ascertain the profits of the trade for trade incomings are not profits of the trade till trade outgoings have been paid and deducted The direction to compute the full amount of the balance of profits must be read as subject to certain allowances and to certain prohibitions of deductions but that a deduction if there be such which is neither within the terms of the prohibition nor such that the expressed allowance must be taken as the exclusive definition of its area is one to be made or not to be made according as it is or is not on the facts of the case a proper debit item to be charged against incomings of the trade when computing the balance of profits of it — Per *Lord Sumner* (*ibid*)

Business deductions—Irrecoverable Loans—

[*Section* 10 (2)] —Where an assessment is made of profits or income from a banking or money lending business loans which cannot be recovered should be deducted from the assessed profits of such business at the time when such loans can be definitely proved to be irrecoverable For example if a banker has lent out 5 lakhs of rupees and received Rs 50 000 as interest but has during the same year lost an irrecoverable loan of Rs 25 000 he should be assessed on Rs 25 000 Similarly if the same banker receiving Rs 50 000 as interest on his loans suffers a loss of an irrecoverable loan amounting to one lakh during the same year the income to be assessed to income tax from the money lending business in that year will be *nil* These examples will apply whether the assessee had previously been assessed to income tax or not

This instruction will also apply to the assessment of other traders where loans have been made in connection with the business and in which the loans are of the nature of the business and the loss is a true trading loss

(34) 2 Tax Cases 321
(35) 3 Tax Cases 185

The irrecoverable loans in the sense referred to in this paragraph are sometimes confused with the "bad debts" described in paragraph 35 but they are of a totally different nature Money lent out on interest is the stock in trade of a money lender or banker, and the loss of such stock in trade can clearly be regarded as a trading loss like the loss of the stock in trade of any other trader where the loss is not covered by insurance In settling claims of this nature the question has always to be considered whether money lending is, or is not, a part of the business of the trader in question The investment of savings or occasional loans made to acquaintances cannot be considered to be loans made in the course of trading (*Income tax Manual*, para 41)

Business deductions—General—

While, as stated in paragraph 35, it is not possible, owing to the variety of accounting systems to prescribe exhaustive lists of deductions that are or are not permissible in the case of all businesses, section 10 (2) contains a list of allowances that are permissible in the case of all businesses The following is a list of the deductions that are not permissible in the case of any business whatever the system of accounting may be that is adopted —

reserves for "bad debts" or for "provident" or other funds or any other purpose such as the equalisation of profits or dividends,

expenditure of the nature of charity or presents,

expenditure of the nature of capital,

cost of additions to or alterations extensions or improvements of, and of the assets of a business,

sums paid on account of income tax or super tax in India or elsewhere or any tax levied by any authority other than land revenue, local rates or municipal taxes in respect of the portion of the premises only which is used for the purposes of the business,

drawings or salaries of the proprietors or partners,

interest on the proprietors' or partners' capital including interest on reserve or other funds,

private or personal expenses of the assessee,

rental value of property owned and occupied by the owner of a business for the purposes of the business,

losses sustained in former years,

any loss recoverable under an insurance or a contract of indemnity,

depreciation of any of the assets of the business other than the depreciation allowed under section 10 (2) (vi),

any sums paid on account of any cess, rate or tax levied on the profits or gains of any business or assessed at a proportion of or otherwise on the basis of any such profits or gains,

any expenditure of any kind which is not incurred solely for the purpose of earning the profits (*Income tax Manual*, para 40)

Onus on assessee—

Deductions in order to be admissible should fall under one of the clauses of sub section (2), and the examples given in the above paragraph of the Income tax Manual do not fall under those clauses See, however, notes under the heading 'Profits' *ante* Some of the examples are taken almost verbatim from the provisions of the United Kingdom law which is full of otiose provisions For example, notwithstanding the fact that the United Kingdom law prohibits deductions on account of expenditure not wholly or exclusively laid out for earning the profits, it again explicitly prohibits the deduction of personal expenses, losses not connected with the trade, etc As regards losses recoverable under an insurance or indemnity, see notes on section 10 (2) (*iv*) *infra*

The onus of proving that a deduction from taxable income is admissible under the Act falls on the subject See *Rowntree & Co* v *Curtis*[36] and *Nopechand Magniram* v *Commissioner of Income tax*[37]

(*i*) any rent paid for the premises in which such business is carried on, provided that, when any substantial part of the premises is used as a dwelling-house by the assessee, the allowance under this clause shall be such sum as the Income-tax Officer may determine having regard to the proportional part so used,

(*ii*) in respect of repairs, where the assessee is the tenant only of the premises, and has undertaken to bear the cost of such repairs, the amount paid on account thereof, provided that, if any substantial part of the premises is used by the assessee as a dwelling-house, a proportional part only of such amount shall be allowed,

Allowance on account of rent of business premises—

[*Section* 10 (2) (*i*)]—The allowance referred to in this clause, is only in respect of that portion of the premises in which the business is carried on, and the same limitation applies to all allowances relating to premises or buildings in clauses (ii), (iv), (v), (vi) and (viii). Where premises are owned by the owner of the business, no allowance of course is permissible since the owner is not liable to pay tax on the annual

(36) 8 Tax Cases 678
(37) 2 I T C 146

value of such premises under section 9 Where the trader resides in a part of the business premises the full rental cannot be set against the profits and the Income tax Officer must in each case, determine the portion of the rent that may so be set off (*Income tax Manual*, para 42)

Allowances on account of repairs of business premises—

Where the assessee is himself the owner of his business premises he is allowed as a deduction the amount spent on repairs each year on the portion of the premises used for the purposes of the business under section 10 (2) (v), where he is the tenant of the premises he is, under section 10 (2) (ii), allowed the amount expended by him on repairs if his lease requires him to execute repairs Where the premises are occupied partly as a residence and partly for the purposes of a business the same proportion of the disbursements on repairs should be permitted to be deducted as is taken in calculating the rent permissible under section 10 (2) (i) The phrase "current repairs" in section 10, sub section (2) (v) should be interpreted to mean, such repairs required to keep machinery plant etc in serviceable condition, as are rendered necessary by ordinary wear and tear (as opposed to accidental or wilful damage or other unusual causes) and are of their nature recurrent (supposing that the owner displays reasonable care and prudence in keeping the asset whatever it may be in good order) at comparatively short intervals—say at least once in two or three years It also includes minor replacements (in respect of which it would be absurd to expect an entry to be made in a block account or similar record or in any records maintained for the purposes of calculating depreciation) and also mere adjustments of existing parts

Expenditure on anything that if it had been done when the asset was new would have increased its capital value should be regarded as capital expenditure (*Income tax Manual*, para 43)

Rent of railway track—

In return for the grant of free land, a guaranteed income per mile and exemption from local cesses, a Railway Company agreed to share with a District Board in equal moieties the excess of profits over 4 per cent of the capital It was contended on behalf of the Railway that the payment of surplus profits to the Board was deductible from the taxable profits of the Railway either as the rent of the 'premises,' i e, the track, which was laid on the free land, or as a local rate on the 'premises' or as expenditure necessary to earn the profits *Held*, that the payment to the Board was an appropriation of profits and not deductible from the Railway's taxable profits [38]

Meaning of words—

"Premises" have been nowhere defined, but see notes under section 10 (2) (viii) *infra*

(38) *Howrah Amta Ry v Commissioner of Income tax*, 2 ITC 304

"Substantial" is a vague, relative word, its meaning can involve questions only of fact

"Dwelling house", not necessarily a house actually dwelt in—

"ordinarily comprises a building adapted for and capable of being dwelt in, and which is dwelt in whether by a care taker or others although the larger part of it is used for trade or business "[39]

It should be noted however that under the Indian Law it is only if a *substantial* portion is used as a dwelling house by the assessee, the Income tax Officer can modify the allowance on account of rent Even "Inhabited Dwelling house" has been construed as equivalent to inhabitable dwelling house, *i e*,

"Ready to be slept in although on no single occasion during the year of assessment was it let or actually resided in "[40]

Previous law—

In the 1918 Act, the value of business premises was assessed under 'House property' and a *per contra* allowance given as a business expense This cumbrous arrangement which was based on the English model was given up in 1922

(*iii*) in respect of capital borrowed for the purposes of the business, where the payment of interest thereon is not in any way dependent on the earning of profits, the amount of the interest paid ,

Explanation —Recurring subscriptions paid periodically by shareholders or subscribers in such Mutual Benefit Societies as may be prescribed, shall be deemed to be capital borrowed within the meaning of this clause ,

Business—Allowance in respect of borrowed capital—

[*Section* 10 (2) (*iii*)] —The allowance under this clause can only be given where payment of the interest is not in any way dependent on the earning of the profits It cannot be allowed therefore in respect of any borrowings the interest on which is not payable unless profits are earned or the interest on which varies according to the amount of the profits earned In all cases it will be a question of fact whether the payment of interest is or is not actually dependent on the earning of profits No allowance can be made in respect of the share capital of companies or of the capital put into a firm by the partners, but a company is entitled to an allowance of the interest paid on its debentures and a firm to an allowance of interest on money borrowed under a mortgage On the other hand, a firm alleging that it has no independent capital . .

(39) *Lewin* v *George Newnes* 90 L T 160

(40) *Smith* v *Dauney* (1904) 2 K B 186, 5 Tax Cases 25

that it is working only on capital lent by the partners at a definite rate of interest which must be deducted from the earnings of the firm before its profits can be declared is not entitled to allowance under this section unless definite proof is given that a particular partner has made a legal loan to the firm i e, a loan under an instrument on which he can sue and under which interest at a fixed rate is to be paid to him annually irrespective of the earning of any profits Similarly the share of profits given to Muhammadan depositors in lieu of interest on borrowed capital cannot be allowed as a business expense

Salaries or commission paid to a partner can, under no circumstances be treated as a business expense

No rule has been made under the 'explanation' to this Clause defining what Mutual Benefit Societies are to have the benefit of the 'explanation' It has been found that the 'explanation', if applied, is likely to give more trouble to the societies than the present procedure Executive instructions have however been issued that in the case of such societies (which appear to be peculiar to the Madras Presidency) where the taxable income is Rs 5 000 or under and where the "shareholders" or subscribers" reside within the limits of the circle of one Income tax Officer the company or society should not be assessed direct to income tax, but the principal officer should furnish the Income tax Officer with a list of the amounts paid out to subscribers showing the original subscriptions or capital invested and the interest thereon, and the Income tax Officer should ascertain what particular recipients of these payments are liable to tax and should add the amount of interest that they have received to the income on which they would otherwise have been assessed, that is he should assess the recipients direct (*Income tax Manual*, para 44)

'*Periodically*' excludes uncertain intervals[41 42] Payments should be at fixed times and under antecedent obligation and not at variable periods at the discretion of individuals

Previous law—

The explanation clause was inserted in 1922 primarily with reference to the Madras societies mentioned above, but as stated above no rule has been made

United Kingdom Law—

Under the United Kingdom law no deduction can be made in respect of any annual interest or any annuity or other annual payment payable out of the profits or gains but the assessee is entitled to deduct and retain tax from the interest paid by him If the interest is not 'annual', as for instance interest paid on overdrafts at the Bank, deduction is allowed The question, therefore, whether interest is 'annual', is one of importance in that country, and there are a number of decisions on the subject *Goslings and Sharpe v Blake*, 2 Tax Cases 450 (C A.); *Garstor*

(41 42) *Jones v Ople*, 8 Ch 192—*Under the English Appropriation Act*

Overseers v *Carlisle*, 6 Tax Cases 659 (K B D), *Gateshead Corporation* v *Lumsden*, (1914) 2 K B 883 (C A), *Scottish North American Trust, Ltd* v *Farmer* 5 Tax Cases 693, *Inland Revenue Commissioners* v *Sir Duncan Hay*, 8 Tax Cases 636 But they are of no help in elucidating the Indian Law Similarly there are decisions as to what constitutes Interest on 'Capital'—the leading case being that of *Scottish North American Trust* v *Farmer*,[43] but these cases too are not of help because, under the Indian law, interest on capital borrowed for the purpose of the business is a permissible deduction under section 10 (2) (*ix*) so long as such interest is not dependent on the earning of profits

Interest on loans by Partners—

Interest on capital is not a permissible deduction even if the partnership deed stipulates the payment of interest on capital plus a share of the profits Such an arrangement is only a method of sharing profits But interest on deposits of partners is permissible if the deposits remain for definite periods and is not really capital for developing the business That is to say, if the deposits are genuine deposits like deposits from customers, the interest can be deducted The question is always a question of fact,[44] and ordinarily the presumption would be that the deposit was capital put in by the partner, and he would have to rebut the presumption by satisfactory evidence It has been held that where a partner, as partner, lends *bona fide* to the partnership money beyond the initial capital at an agreed rate of interest, the interest on the loan should be deducted[45] It is a question of fact whether the advance is a loan to the partnership or an increase in the capital of the firm[46]

Even if the loan be taken from other persons than partners, no deduction will be allowed on account of interest if the interest is in any way dependent on the earning of the profits It will thus be seen that the provisions of the Income-tax law do not exactly correspond to those of the ordinary law of partnership No interest will be allowed as a deduction on account of capital supplied by the partners (as distinguished from deposits or loans made by them which will be capital *borrowed*), and likewise, no matter who is the lender, if the interest is in any way dependent on the earning of profits, the interest cannot be deducted

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(43) 5 Tax Cases 693

(44) In re *Lallamal Hardeo Das* 1 I T C 266

(45) *A L S P P L Subramaniam Chetti* v *Commissioner of Income tax, Madras* 3 I T C 187, *Bhola Shah Narsingdas* v *Commissioner of Income tax, Punjab*

(46) *Ibid* and *Commissioner of Income tax Burma* v *K K C T Chettyar Firm*

The converse question, *viz*, whether interest paid by a partner to the firm should be taxed as the income of the firm was answered in the affirmative in *Harakchand Tolaram v Commissioner of Income tax Bengal*[47] Whether the advance to the partner is a loan, is a question of fact, and if it is a loan, the position is that to whomsoever the firm lends money on interest, the interest when it comes in becomes the firm's property

Partners—Salaries of—

In a Madras case, the assessees who were a firm consisting of four partners and who shared in profits and losses in certain specified proportions, claimed, among other expenditure, a sum paid to three of the partners as salaries The claim was disallowed, but the assessees contended that if persons other than the owners of the firm had been employed for the work looked after by the owners, the salaries paid to those other persons would have been admissible as deduction from profits, and no distinction should have been made because the payments were made to the owners themselves The Commissioner's reference to the High Court ran as below —

(1) In this case the Agreement has been drawn up with the special intention of presentation in this reference, and must be viewed accordingly

(2) In the present case, the amounts payable as salaries are Rs 1 000 a month to one of the partners and Rs 500 each to two other partners It has not been suggested that the partners have any special qualification to justify such large rates and it is quite arguable that these sums represent not salaries in the real sense of the term, but additional shares of profits of these three partners as compared with the share of the fourth and sleeping partner

* * * * * *

A Full Bench of the High Court decided that

"On the facts stated we have no hesitation in answering that the drawings of the partners by whatever name they are described are part of the profits and therefore taxable"—*Board of Revenue v Vegaraju Venkatasubbaya Garu*[48]

If however a particular partner or partners possess special qualifications for which they are paid a salary irrespective of the existence of profits and over and above their share of the profits, the salaries could evidently be claimed as a deduction The dual capacity of a partner *cum* employee, though suspect, is possible, and to the extent that the person is in truth an employee

(47) 3 I T C 363.
(48) 1 I T C. 176

the salary is presumably deductible from the profits of the partnership

Mudibhagidars—Advances by—Interest on—

The assessees were three brothers doing business as a firm They attracted capital by means of borrowings from persons known as Mudibhagidars who received certain specified shares in the profits of the business, but were not responsible for the losses, if any They were not partners in the business The question was whether the firm was entitled to an allowance under section 10 (2) (*ix*) *Held* that no allowance was permissible

Per *Shah and Kincaid, JJ*—The advances made by Mudibhagidars are clearly in the nature of capital borrowed for the purposes of business With reference to the allowance to be made in respect of the capital borrowed for the purpose of the business there is an express clause *viz*, clause (*iii*) of that sub section Under that clause the allowance can be made for the amount of the interest paid where the amount of interest in respect of capital borrowed is not in any way dependent on the earning of profits In the present case admittedly the amount payable to the Mudibhagidars is dependent upon the earning of profits So even if the payments of certain portion of the profits to the Mudibhagidars are to be treated as being in lieu of interest within the meaning of clause (*iii*) as they are dependent on the earning of profits the profits would not be liable to any deduction or allowance in respect thereof It would be rather an anomalous result if under clause (*iii*) which is directly applicable to capital borrowed for the purposes of the business an allowance cannot be made still it should be capable of being made under clause (*ix*) There is considerable force in the argument urged on behalf of the Crown that in this case if an allowance cannot be made under clause (*iii*), it cannot be made at all Still we have to consider the argument urged on behalf of the assessees whether this can be treated as expenditure incurred solely for the purpose of earning such profits or gains Without attempting to define the exact scope of this clause it seems to us to be sufficient to say that payments to be made in certain proportion out of the profits on the capital advanced for the purposes of business cannot be treated as expenditure incurred solely for the purposes of earning such profits or gains within the meaning of clause (*ix*) of sub section (2) of section 10 [49]

In a case in the United Kingdom in which a loan carried a fixed interest plus a share in profits, it was held that the latter share was not deductible from taxable profits [50]

"The business" referred to in this clause is the business the profits of which are under assessment, and the deductions

(49) *Commissioners of Income tax v Haji Jamal Nurmahomed & Co* 1 I T C 396

(50) *A B Walker & Co v Commissioner of Inland Revenue*, 12 Tax Cases 297

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(47) 3 I T C 363.
(48) 1 I T C. 176

The contention of the Crown was that the Company should be taxed on its whole earnings save such sums as may be deducted under section 9 (2) of the Income tax Act [now section 10 (2)] *Held* that the liability to tax must be determined with reference to the special agreement between the two parties and the nature of their relation to one another and that the tax should be levied on what was retained by the Company

Per *Woodroffe, J* — The Secretary of State is the owner of the Bengal Nagpur Railway which has been constructed and is managed for him by the Company This is their business on the income of which tax is leviable In my opinion the principle applicable is that the Company should pay tax on what they get

In my opinion they are not liable in respect of sum (*a*) This is interest due to the Secretary of State on 15½ Million capital found by him It is true that this capital has been the means whereby profits have been earned in which the Company share But this is not the Company s property It as also three Million Pounds supplied by the Company are the property of the Secretary of State and all receipts earned by the use of these two sums are paid to Government Account Thereout the Government supply what sums are necessary to defray expenditure under the Contract Out of such receipts the Government repays itself the interest on the capital sum supplied by it And this interest is deducted before the profits in which the Company are entitled to share can be ascertained It is this share of surplus profits which is income earned by the Company and so liable to tax Sum (*b*) represents interest which the Company get for their three Million capital money and which has to be deducted before surplus profits can be ascertained This is deducted in order that the Secretary of State may meet his obligations to the Company in respect of the three Million Pounds they have made over to him It is stated that that money was borrowed in England and the liability is to pay interest in England It is stated in the case of the Company that the sum of Rs 13 07 440 is payment to the Secretary of State in rupee currency of the amount of the guaranteed interest pay able by him on the share capital of the Company The guaranteed interest on the Company s share capital is payable and paid in London as in the case of a debenture obligation by the Secretary of State and is independent of the earnings of the Railway The payment, it is contended of the sum of Rs 13 07 440 constitutes the payment of a debt due from the Company to the Secretary of State In effect the transaction is one in which the Secretary of State pays in London certain moneys to the Company which he recoups himself in this country out of the earnings of the Railway In that view of the case I am of opinion that the Company is not liable for tax in respect of this sum "[3]

In *M & S M Railway v Commissioners of Inland Revenue*,[4] a case relating to English Corporation Profits Tax, Rowlatt,

(3) *B N Ry Co v Secretary of State* 1 I T C 178
(4) 5 A T C 739

J held that the interest guaranteed by the Government of India is a distribution of the profits earned This case however can be distinguished from that of the Bengal Nagpur Railway Company, *supra* in view of the considerations set out at the end of the extract from *Woodroffe, J s* judgment The transaction in that case was of the nature of a remittance transaction.

In the Pondicherry Railway Company's case it was held by the Madras High Court that the share of the net profits given by the Company to the French Colonial Government in return for a subsidy and certain concessions received from them was not deductible from the taxable profits inasmuch as it was a distribution of profits

(iv) in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores used for the purposes of the business the amount of any premium paid ,

Business—Allowances in respect of insurance premia—

Section 10 (2) (ii) —The allowances under this clause are restricted to insurance policies taken out against the risk of damage or destruction of buildings machinery plant furniture stocks or stores used for the purposes of the particular business of which the profits or gains are being calculated and no allowance can be made on account of premia in regard to other insurances Further any sums not actually expended on *premia* but merely set aside by a company or firm as an insurance fund are simply a particular description of reserve and no allowance or deduction can be given in respect of such reserves

The Act does not contemplate the deduction of premia on account of insurance against a loss of profit If however, the owner of a business elects to claim any such allowance, he should signify his intention to the Income tax Officer—and if he makes a declaration in writing undertaking generally to pay the tax on any amounts recovered from an Insurance Company under any such policy or policies, the allowance will be granted in respect of the premia for any such policies that he may have taken out not more than a month before the date of such declaration or that he may take out subsequent thereto Where no allowance is asked or allowed in respect of such policy, any sums received from the Insurance Company on account of the policy will not be liable to tax (*Income tax Manual*, para 45)

As regards the genesis of the above instruction, see Mr Sim's speech when the Act was passed —

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(5) 3 I T C 455

"I might explain that the reason why the Joint Committee decided not to put in a special provision in the Bill was that the commercial representatives explained that it would not always be convenient to take advantage of the concession and that certain businesses might prefer not to have the allowance and not to be taxed on any amount received from the insurance company It was, therefore, decided to leave it entirely to the option of the owners of each particular business

Previous law—

The words "furniture, stocks or stores" were added in 1922

Meaning of words—

As to what is meant by 'insurance', see notes under section 4 (3) (*v*)

As regards the meaning of 'damage' and 'destruction', see notes under section 9 (1) (*iii*)

As to 'buildings', see notes under section 9 (1)

Machinery—

'Machinery' implies the application of mechanical means to the attainment of some particular end by the help of natural forces (Stroud)

It is not an easy task to define its meaning The word must mean something more than a collection of ordinary tools It must mean something more than a solid structure built upon the ground whose parts either do not move at all or if they do move do not move the one with or upon the other in interdependent action with the object of producing a specific and definite result

Their Lordships concur with Lord Davey in thinking that there is great danger in attempting to give a definition of the word 'machinery' which will be applicable in all cases It may be impossible to succeed in such an attempt If their Lordships were obliged to run the hazard of the attempt they would be inclined to say that the word 'machinery' when used in ordinary language *prima facie* means some mechanical contrivances which by themselves or in combination with one or more other mechanical contrivances by the combined movement and inter dependent operation of their respective parts generate power or evoke modify apply or direct natural forces with the object in each case of effecting so definite and specific a result But the determination must depend on the special facts of (the) case '[6]

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(6) *Corporation of Calcutta v Cossipur Municipality* I.L.R 49 Cal. 190 (P C)

"A bequest of 'Plant and Goodwill' passes the house of business held at rack rent, also trade fixtures benches, presses and implements of trade, but not stock in trade or household furniture and effects of the ordinary kind "[7]

The Employers' Liability Act, 1880, contains no definition of "Plant", as therein used, "but in its ordinary sense, it includes what ever apparatus is used by a business man for carrying on his business — not his stock in trade which he buys or makes for sale, but all goods and chattels fixed or moveable, alive or dead, which he keeps for permanent employment in his business[8] In that case Esher, M R, and Lindley, L J held that a Wharfinger's horse was part of his "Plant", so of a Coal Merchant's ship[9] The carcase of a house is not part of a Builder's "Plant"[10] but scaffolding and ladders are *Cripps* v *Judge*

But (whilst recognizing *Yarmouth* v *France*) a Cab Proprietor's horses were held not part of his "Plant" within section (2), Bills of Sale Act 1882 *because there the context — e g, "Trade Machinery" and* "Fixtures" — indicates that "Plant", as there used refers to something connected with the premises[11]

Qua and by section 104 Factory and Workshop Act 1901, " 'Plant' includes any gangway or ladder used by any person employed to load or unload or coal a ship "

' 'Plant' and Machinery' are two quite different things "[12] On *a contract for the sale of a Freehold Brewery which provided that its* 'Fixed Plant and Machinery' should be paid for by valuation Kekewich J held that, "speaking generally, 'Machinery' includes everything which by its action produces or assists in production and that 'Plant' *might be regarded as that without which production could not go on* and included such things as brewer's pipes, vats and the like", and that therefore a Chimney Shaft, which was built just outside the boiler house but formed no part of it, a double boarded partition *forming a malt and grain store and Staging, erected by placing joists* on the stout bearers built into the walls, were not to be included in the valuation (Stroud)[13]

Plant—

A set of machinery, tools, etc, necessary to conduct a mechanical business often including the buildings and grounds, or in the case of a railroad the rolling stock but not including

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(7) *Blake* v *Shaw*, 8 W R 410, Johns 732

(8) Per *Lindley L J*, in *Yarmouth* v *France*, 57 L.J Q B 17, 19 Q B.D 647 36 W R 281

(9) *Carter* v *Clarke*, 78 L T 76

(10) *Conway* v *Clemence*, 80 Law Times, 44 58, 2 Times Rep 80

(11) *London and Eastern Counties Loan Co* v *Creasy*, (1897) 1 Q B 768, 66 L J Q B 503, 76 L T 612, 45 W.R 497 (Stroud)

(12) Per *Kekewich, J*, in *Re Brooke*, 64 L.J Ch 27

(13) Re *Nutley and Finn* W N (94) 64

material or produce, hence the permanent appliances needed for any institution as a Post Office (Standard Dictionary)

The following have been held to be 'plant' —Ships [14] a hulk which had formerly been a sailing ship and was used as a floating warehouse for coal,[15] railway engines, etc, and tools[16] and tramway rails[17] but a stallion is not 'plant'[18] nor the bed of a harbour [19]

In construing the word 'plant' for income tax purposes especially under the Indian Act, regard must be paid to the grouping in which the word occurs In clause (iv) of this sub section the grouping is "buildings, machinery, plant, furniture, stocks or stores', in clauses (v) and (vi) it is 'buildings, machinery, plant or furniture' Considering this grouping it would seem that the decisions under other Acts—*e g*, Employer's Liability Act—declaring horses, etc, to be 'plant' will not apply to income tax cases In *Derby* v *Aylmer* cited *infra,* though it was decided that a stallion is not plant, the question whether a traction horse was 'plant' was left open, but it is doubtful whether it is 'plant' Similarly elephants, bullocks and other animals used in a business are evidently not 'plant' for income tax purposes See clause (vii a) *infra* inserted by Act III of 1928

Furniture—

' It has not yet been declared what is meant by furniture —per *Brett, M R*, in In re *Parker* Ex parte *Turquand,* 14 Q B D 636

"A bequest of furniture may pass pictures (*Cremarne* v *Antrobus,* 5 Rudd 312) or fixtures but not a library of books"[20] nor stock in trade [21]

But there is nothing under the Indian Income tax Act to prevent the cost of insurance of a library of books being claimed as a deduction under section 9 (2) (*ix*) if the library is necessary for the business

Stocks or stores—

In commercial practice it is usual to refer to 'stocks' of the principal raw materials and of the finished goods and to 'stores' of incidental articles which are consumed in the course

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(14) *Burnley Steamship Co* v *Aikin* 3 Tax Cases 275
(15) *John Hall Co* v *Rickman* (1906) 1 K.B 311
(16) *Caledonian Railway* v *Banks* 1 Tax Cases 487
(17) *L C C* v *Edwards* 5 Tax Cases 383
(18) *Earl of Derby* v *Aylmer* 6 Tax Cases 665
(19) *Dumbarton Harbour Board* v *Cox* 7 Tax Cases 147
(20) *Bridgman* v *Dove* 3 A.I.K 202
(21) Re *Presby* 92 Law Times 391 (Stroud)

of manufacture The cotton and the semi finished and finished yarn and cloth form the 'stocks' of a cotton mill, the parts of machines, lubricating oil, coal, etc, being referred to as 'stores'

'Stocks' exclude goodwill[22]

"The phrase comprises all such chattels as are acquired for the purpose of being sold or let to hire in a person's trade, and it probably includes utensils in trade (*Seymour* v *Rapier Bunb*, 28)" (Stroud)

Utensils in trade, *i e*, implements and tools would, however, in commercial practice be more often classed as 'stores' than as 'stocks'

Used for the purpose of the business—

This qualifies all the words from "buildings" to "stores" This of *course is only a reiteration of the general principle that* no expenditure can be deducted which is not necessary for earning the profits, but the words "used for the purpose of the business" are a little wider than "solely incurred for the purpose of earning profits" in clause (*ix*)

When used—

Section 3 governs the whole Act, and in section 10, where an allowance has to be made covering a longer period than a year or ascertainable only at a later period, a definite proviso is inserted to meet the case [see clauses (vi) and (vii)] It is therefore obvious that the buildings, etc, should have been used for the purpose of the business during the previous year,[23] *but* the buildings, etc, need not have been *actually* so used *throughout* the year

The above ruling applies equally to clauses (iv), (v) and (vi)

Livestock—

Insurance of livestock used in business is evidently admissible, either as insurance of plant (which is doubtful) or as stocks —which presumably includes not only stocks of goods but both live and dead stock On the other hand in view of the express reference to furniture which is the same as dead stock it is possible to contend that the stocks contemplated are stocks of goods and do not include livestock In that case the insurance would be admissible under clause (ix)

Sums recovered for insurance policies—

There is no doubt that sums recovered on insurance policies on account of loss of circulating capital, *e g*, trading

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(22) *Chapman* v *Haym* 1 Times Rep 397

(23) *Radhakishen & Sons* v *Commissioner of Income tax*, 3 I T C 73

stocks, should be treated as revenue items and taxed, but recoveries on account of loss of fixed capital would be capital receipts just as the loss of such capital would be capital loss The point is that it is part of the course of business of a prudent trader to insure stocks, and money received from insurance companies on account of loss of stocks stands on the same footing as the sale proceeds of such stocks[24] Or, to put it in another way, the business of a trader is to buy and sell stocks When stocks are sold, they are converted into money It is immaterial whether the conversion results from sales or from insurance, and it is irrelevant to argue that the business of an ordinary trader is not that of insurance

Insurance of profits—

As regards insurance against loss of profits, there is no difference between the provisions in the United Kingdom law and those in the Indian law In either country if the cost of such insurance can be allowed at all it is only as expenditure incurred for the purpose of earning the profits Under the Indian law it cannot be allowed under section 10 (2) (*iv*) but, if at all only under section 10 (2) (*ix*) In *Usher's Wiltshire Brewery* v *Bruce*[25] it was held in the United Kingdom that premia paid by a Brewery in order to provide against the loss of trade occasioned by the taking away of a licence from the defaulting tenant of a Tied house was a permissible deduction from the profits of the Brewery Presumably the same considerations will apply to premia paid to insure against loss of profits That is to say insurance can be claimed against *specific* risks to profits The line however which divides *specific* risks from *general* risks is difficult to define The sum recovered under such an insurance policy is not a 'capital sum' within the meaning of section 4 (3) (*v*) but a 'profit' and therefore taxable as such in the year of receipt—Cf *Green* v *Glikstein & Son, Ltd*, *supra* In view however of the executive instructions in paragraph 45 of the Income tax Manual none of these questions will arise in practice in this country

Insurance of Lives of Employees—

It is not clear how a premium paid to insure the life of an employee who personally influences the business and whose death will cause a diminution of profits should be treated On the same grounds as premia paid to insure against loss of profits such premium can presumably be claimed as a deduction under

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(24) *Green* v *Glikston & Sons* 1929 A C 381

(25) 6 Tax Cases 399

section 10 (2) (*ix*) and the amount recovered under the insurance policy treated as profits in the year of receipt Premia paid for the insurance of lives of employees for their benefit and not for that of the employer will stand on the same footing as a bonus or salary

Insurance against accidents to employees—

Premia paid for such insurances as well as insurances against compensations under the Workmen's Compensation Act should all be dealt with evidently under section 10 (2) (*ix*), and not under this clause

(*v*) in respect of current repairs to such buildings machinery, plant, or furniture the amount paid on account thereof ,

Previous law—

The word 'furniture' was added in 1922

Repairs—

This is a word with an indefinite connotation It ordinarily means "to make good defects including renewal where that is necessary " It will include patching, where patching is reason ably practicable and "where it is not you must put in a new piece "[26] But 'repairs' do not connote a total reconstruction [27]

' An agreement to keep 'in repair' a house out of repair means that the contracting party is first of all to put it in good repair having regard to its age and its class—a house in Spital fields would not be repaired in the same style as one in Grosvenor Square—and (semble) you are to take into consideration the condition of the premises at the time of the contract "[28] (Stroud)

Current—

The meaning of the word 'current' is not clear It obviously means such repairs as can be fairly treated as current, *i e*, not being 'capital ' In that view it hardly adds to the con notation of the word 'repairs', as this word can never include total construction or reconstruction on such a large scale as to make it 'capital' expenditure The construction of the word 'current' as equivalent to 'recurrent' would also lead to the same result See also paragraph 43 of the Income tax Manual set out under clauses (*i*) and (*ii*)

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(26) Per Lord Blackburn *Inglis* v *Buttrey* 3 A C 552
(27) *R* v *Epsom*
(28) *Stanley* v *Towgood* 6 L J.P 129

The question whether expenditure in a business—say, a shipowner's—is current as opposed to capital must essentially be one of degree and therefore one of fact To elucidate the problem, a number of outside considerations may have to be taken into account in addition to the materials provided by the assessee, *e g*, local conditions, the ordinary life of the type of boats used by the assessee and the normal cost of keeping them in serviceable condition The assessee, however, cannot neglect to provide the Income tax Officer with the information that is necessary and then take advantage of his own negligence to plead that the Income tax Officer's conclusions are based on insufficient evidence [29]

Repairs—Question of fact—

Whether 'repairs' are really 'repairs' or constitute replacement of capital assets is a question of degree, and like all questions of degree, a question of fact [30] It is also a matter depending to some extent on Accountancy and business usage and in this view also a question of fact [31]

Such buildings, etc —

That is, buildings, etc, used for the purpose of the business As to this qualification, *see* notes under section 10 (2) (*iv*)

(*vi*) in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed

Provided that—

(*a*) the prescribed particulars have been duly furnished ,

(*b*) where full effect cannot be given to any such allowance in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, the allowance or part of the allowance to which effect has not been

(29) *Ramanatha Reddi v Commissioner of Income tax* 6 Rang 175

(30) *Stubbs v Cooper* 10 Tax Cases 29 (CA) 373, *Currie v Inland Revenue Commissioners* (1921) 2 K B 332 (CA)

(31) *Fassett and Johnston v Commissioners of Inland Revenue* 4 A T C 59

given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or if there is no such allowance for that year, be deemed to be the allowance for that year, and so on for succeeding years ; and

(c) the aggregate of all such allowances made under this Act or any Act repealed hereby, or under the Indian Income-tax Act, 1886, shall, in no case, exceed the original cost to the assessee of the buildings, machinery, plant, or furniture, as the case may be ;

Rule 8—

An allowance under section 10 (2) (*vi*) of the Act in respect of depreciation of buildings, machinery, plant or furniture shall be made in accordance with the following statement:—

Class of buildings, machinery, plant or furniture	Rate	REMARKS
	Percentage on prime cost	
1 *Buildings** —		* Double these rates may be allowed for buildings used in industries which cause special deterioration such as chemical works, soap and candle works, paper mills and tanneries
(1) First class substantial buildings of selected materials	2½	
(2) Buildings of less substantial construction ..	5	
(3) Purely temporary erections such as wooden structures	10	
2 *Machinery Plant or Furniture* † —		† The special rates for electrical machinery given below may be adopted, at firm's (assessee's ?) option, for that portion of their machinery
General rate .	5	
Rates sanctioned for special industries—		
Flour Mills, Rice Mills Bone Mills Sugar Works, Distilleries, Ice Factories, Aerating Gas Factories, Match Factories	6 1/2	
[illegible] tories, Chemical Works, Soap and Candle Works, Lime Works, Saw Mills, Dyeing and Bleaching Works, Furniture and Plant in hotels and boarding houses, Cement Works using rotary kilns	7 1/2	
Plant used in connection with Brick Manufacture, Tile making Machinery, Optical Machinery, Glass Factories, Telephone Companies, Mines, Quarries Tube Well Plant and Concrete Pile Driving Machines	10	

Class of buildings, machinery, plant or furniture.	Rate	REMARKS
	Percentage on prime cost	
[illegible] ..	12½	
[illegible] mess, indi	15	
[illegible] ..	20	
Ropeway ropes and trestle sheaves and connected parts	25	
Ropeway structures		
(1) Trestle and station steel work .	5	
(2) Driving and tension gearing .	7½	
(3) Carriers .	10	
3 *Electrical Machinery* —		
(*a*) Batteries .	15	
(*b*) Other electrical machinery including electrical	7½	
(*c*) Underground cables and wires	6	
(*d*) Overhead cables and wires .	2½	
4 *Hydro Electric concerns*— Hydraulic works pipe lines sluices, and all other items not otherwise provided for in this statement	2½	
5 *Electric tramways*—		
Permanent way —		
(*a*) Not exceeding 50 000 car miles per mile of track per annum	6¼	
(*b*) Exceeding 50 000 and not exceeding 75 000 car miles per mile of track per annum	7 1/7	
(*c*) Exceeding 75 000 and not exceeding 125 000 car miles per mile of track per annum	8 1/3	
Cars—car trucks car bodies electrical equipment and motors	7	
General plant machinery and tools	5	
6 *Mineral Oil Companies* —		
A Refineries—		
(1) Boilers	10	
(2) Prime movers	5	
(3) Process plant	10	
B Field operations—		
(1) Boilers .	10	
(2) Prime movers ..	5	
(3) Process plant ..	7½	

Class of buildings, machinery, plant or furniture	Rate	REMARKS
	Percentage on prime cost	
Except for the following items —		
(1) Below ground—All to be charged to revenue ..	.	
(2) Above ground—		
(*a*) Portable boilers, drilling tools, well head tank, rigs, etc	25	
(*b*) Storage tanks .	10	
(*c*) Pipe lines—		
(*i*) Fixed boilers .	10	
(*ii*) Prime movers .	7½	
(*iii*) Pipe line .	10	
7 *Ships*—		
(1) Ocean —		
(*a*) Steam ..	5	
(*b*) Sail or tug ..	4	
(2) Inland—		
(*a*) Steamers (over 120 ft in length) ..	5	
(*b*) Steamers including cargo launches (120 ft in length and under)	6	
(*c*) Tug boats ..	7½	
(*d*) Iron or steel flats for cargo etc ..	5	
(*e*) Wooden cargo boats up to 50 tons capacity ..	10	
(*f*) Wooden cargo boats over 50 tons capacity ..	7½	
(*g*) Motor launches ..	10	
(*h*) Speed boats*	15	* Speed boat means a motor driven boat with a high speed internal combustion engine capable of propelling the boat at a speed exceeding 15 miles per hour in still water, and so designed that when running at speed, it will plane *i e* its bow will rise from the water
8 *Mines and Quarries*—		* Depreciation on rails used for tramways and sidings, and in inclines where the rails are the property of the assessee is allowed at 10 per cent
(1) Railway siding* (excluding rails) .	5	
(2) Shafts ..	5	
(3) Inclines* ..	5	
(4) Tramways on the surface* (excluding rails) ..	10	

Class of buildings machinery, plant or furniture	Rate	REMARKS
		under item 2 above (plant used in connection with *Mines and Quarries*) in addition to any depreciation allowance on the cost of constructing the tramways sidings or inclines

Rule 9—For the purpose of obtaining an allowance for depreciation under proviso (*a*) to section 10 (2) (*vi*) of the Act, the assessee shall furnish particulars to the Income tax Officer in the following form —

Description of buildings machinery, plant, or furniture	Original cost	Capital expenditure during the year for additions, alterations improvements and extensions	*Date* from which used for the purposes of the business	Particulars (including original cost depreciation allowed and value realised by sale or scrap value) of obsolete machinery plant or furniture sold or discarded during the year with dates on which first brought into use and sold or discarded	REMARKS
1	1 A	2	3	4	5

I————declare that to the best of my information and belief the buildings, machinery, plant and furniture described in column 1 of the above statement were the property of——during the year ended————and that the particulars entered in the statement are correct and complete •

Place *Signature*

Date *Designation*

Allowances in respect of Depreciation—

[*Section* 10 (2) (*vi*)]—The allowances permissible under this clause are prescribed in rule 8 and the information that must be furnished in order to obtain an allowance is set out in rule 9 It is only the particular classes of buildings machinery, plant or furniture mentioned

in rule 8 in respect of which the depreciation allowance can be claimed, and the buildings, machinery, plant or furniture for which depreciation allowance is claimed must be used for the purposes of the particular business of which the profits or gains are being computed No allowance can be claimed on account of depreciation for example, of any portion of a building which is used as a residence by the assessee Further, the buildings etc, must be the property of the assessee No allowance can be claimed if they are leased from others

Buildings belonging to the owner of a business and used by him in order to house his employees are buildings used for the purpose of business if the owner charges no rent If, however, rent is charged section 9 would apply

The Madras High Court in *Commissioner of Income tax, Madras v Messrs Massey & Co, Ltd, Madras*[32] have ruled that when a person succeeds to a business he is entitled to carry forward for the purpose of assessment the unexhausted depreciation allowance in respect of build ings machinery, plant etc due to his predecessor in the years previous to the succession The depreciation allowance due to the successor on account of the buildings machinery etc taken over by him should there fore be worked out on the basis of the original cost to the predecessor and not on the value at which the building, machinery, etc are taken over by him Depreciation should be allowed on the cost of setting up machinery and plant, that is, the expression "original cost" in section 10 (2) (vi) should be held to include the cost of freight the pay of the Engi neer and staff who erect the machinery, put it in working order and carry out experiments to test it The rates of depreciation allowance fixed in rule 8 are fixed rates for the whole of India Depreciation at those rates must be allowed each year when there are sufficient profits and only the excess of the depreciation allowance over profits can be carried forward from year to year until absorbed, and this practice must be followed whether the depreciation allowance is adjusted in the accounts of the assessee or not and irrespective of the amount shown in the accounts It is for this reason that in the form of returns of income prescribed in rules 18 and 19 any amounts entered in the accounts of an assessee for the depreciation of any of the assets of the business must be written back as the amount allowed for income tax purposes is the amount prescribed *in the rules and not the amount entered in the* books of the assessee

Where an assessee owns more businesses than one, any part of the depreciation allowance in respect of one business that cannot be set off against the profits of the same business *owing to the profits in question* being insufficient shall be set off, if possible against the profits for the same year of any other business or businesses owned by the assessee Any amount of *depreciation that cannot* be set off against the assessee's business profits for the same year whether he owns one business or more shall be set off under section 24 against his income, profits or gains under any other head in that year Any part of the depreciation allowance due to an assessee that cannot be set off against his income profits or gains

(32) (1928) 56 M L J 451 (F B)

under all heads for the year in question shall be carried forward to the next year under proviso (*b*) sub section (2) (*vi*) of section 10 of the Act The assessee should not be allowed the *option* of either setting off unabsorbed depreciation allowance against the profits of any other business or against other heads of income profits or gains on the one hand or carrying it forward on the other

This clause provides for the depreciation of furniture but it may not suit the convenience of particular traders to ask that a depreciation account should be kept up for petty items of furniture and a depreciation allowance on account of furniture should therefore be granted only in cases in which it is asked for in which event the cost of replacement should not be allowed where such depreciation allowance is not asked for the cost of replacement should be allowed in the year in which the furniture is replaced

Whatever depreciation allowances are granted it will be necessary to maintain an account showing the original cost to the assessee of the plant the amount of the annual allowance the amount of the allowances already granted and the balance still to be allowed

The percentage allowance fixed in the rule for the permanent way of electric tramways only covers cases where the number of car miles per mile of track does not exceed 1 25 000 car miles per annum Where the number of car miles per mile of track per annum exceeds 1 25 000 special terms will have to be made in each case Similarly special consideration should be given to each case where there are special circumstances such as exceptional gradients the compulsory use of wood paving etc tending to show that the car mileage does not fairly represent the wear and tear of the track The cost of renewing concrete foundations should be allowed as a trading expense as and when incurred provided that if the renewed foundations are an improvement on the old ones so much of the cost of the renewed foundations as represents such improvement should not be admitted as a trading expense Amounts received for the old materials whenever renewals are effected should be credited against the cost of the renewals and if the old materials are not disposed of at the time or are used for other purposes their estimated value should be deducted subject to adjustment if necessary as and when the old materials are disposed of The percentages fixed for the depreciation of the permanent way are based upon the estimated life of a track from a consideration of the number of car miles per mile of track and consequently these percentages may vary in connection with the same undertaking It must be clearly understood that the revision of the life of a track need not necessarily be deferred till the whole track is renewed because it may become clear before that date that revision is necessary either in the direction of increasing or decreasing the average life As regards the rate for general plant machinery and tools all other plant and machinery including workshop tools but excluding loose implements office furniture and small articles which require frequent renewals (expenditure on which is allowed as a business expense against revenue) should be lumped together and the rate of 5 per cent depreciation should be allowed thereon

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Where an assessee owns more businesses than one, any part of the depreciation allowance in respect of one business that cannot be set off against the profits of the same business, owing to the profits in question being insufficient shall be set off, if possible, against the profits for the same year of any other business or businesses owned by the assessee Any amount of depreciation that cannot be set off against the assessee's business profits for the same year, whether he owns one business or more, shall be set off under section 24 against his income, profits or gains under any other head in that year Any part of the depreciation allowance due to an assessee that cannot be set off against his income profits or gains

(32) (1928) 56 M L J 431 (F B)

under all heads for the year in question ... next year under proviso (b), sub section ... Act The assessee should not be allowed t... unabsorbed depreciation allowance against t... ness or against other heads of income ... or carrying it forward on the other

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in addition to the cost of repairs No depreciation should be allowed on overhead equipment i e trolley wires and connections all expenditure on maintenance and renewals should be charged as working expenses as and when incurred

The item "Below ground—All to be charged to revenue" in Exception (1) under item 6 (*Mineral Oil Companies*)—*B* (*Field operations*) in rule 8 means that on the plant in question (pipes etc) below ground depreciation is to be allowed at 100 per cent so that if the profits are insufficient in any year to allow of the full 100 per cent being written off against them the balance can be carried forward under proviso (*b*) to section 10 (2) (*vi*) of the Act to subsequent years

No depreciation allowances are granted to railways on account of depreciation of their rolling stock as renewal charges are allowed as a business deduction

As stated in paragraph 37 no allowance can be made on account of the depreciation of the assets of a business other than the particular items mentioned in this sub clause and in rule 8 No depreciation allowance for example is permissible to provide for the amortisation of capital sums paid on account of the purchase of the lease of a mine or for the depreciation of wasting assets such as coal Depreciation allowances should however, be allowed for sinking shafts tramways and sidings in coal mines which are included in the term "plant"

Shares and securities held as part of the capital of a business should be similarly dealt with So long as shares or securities continue to be held by a company, firm or individual as part of his or its capital, any depreciation or appreciation in their market value is outside the scope of the Income tax Act, and similarly, when the value of shares and securities so held (for example, the securities constituting the reserve fund of a bank or other company) is realised the transaction is a capital transaction and no account should be taken for income tax purposes of any profit or loss resulting from the sale On the other hand, where an individual company or firm habitually uses part of his or its resources in the purchase of securities or shares with a view to obtaining profit on their sale and the subsequent reinvestment of the proceeds the individual company or firm is in altering his or its investments carrying on a trade for the sake of obtaining profit therefrom and the profits secured or losses incurred are trade profits or losses which must be taken into account in determining the assessment to income tax It will therefore always be a question of fact to be decided on the merits of each case whether the changes in investment are of sufficiently systematic a character to constitute the exercise of a trade but if they are the profits therefrom are liable to assessment, and an allowance must be made for any losses in calculating the amount of tax payable (*Income tax Manual* para 46)

Previous law—

The word 'furniture' was added in 1922 Under the 1918 Act the rates of depreciation were maxima, now they are fixed rates Also under the 1918 Act no depreciation could be claimed unless it had been debited in the accounts Further, though the

1918 Act provided that the balance of unadjusted depreciation could be added to the allowance for the next year or years, it did not clearly permit its being carried forward indefinitely until adjusted, as the present enactment does

Depreciation—Meaning of—

There is no definition of 'depreciation' The word is actually used in practice by Accountants in varying senses, often including even obsolescence Recent usage, however, confines the word to the sense of wear and tear, and of this only that portion which cannot be made good by repairs That is to say, depreciation represents the insidious and irreparable decay of the plant or machinery, obsolescence being used to signify the unsuitability of a machine or plant on account of its being out of date

In view of the special provisions to cover obsolescence in clause (*vii*), 'depreciation' as used in clause (*vi*) clearly excludes it

'Such' buildings—

That is, those used for the purpose of the business See notes under section 10 (2) (*iv*)

Law in the United Kingdom—

In the United Kingdom law an allowance is made representing "the diminished value by reason of wear and tear during the year" This expression may mean on the one hand that no loss by depreciation may be allowed unless expenditure has been incurred in making it good by repairs On the other hand it may mean that after all damage by wear and tear has been made good by repairs, short of renewal, a further allowance may be made in respect of the imperceptible and irremediable deterioration due to age That is to say, besides allowing for cost of repairs, allowance should also be made to an extent that should permit of the setting aside out of profits, of sums sufficient to provide funds to replace the instrument when by reason of physical deterioration through age it should cease to be worth repairing

In the *Caledonian Railway Company* v *Banks*[33] the Scottish Court held that the depreciation allowance was "for diminished value as a means of earning income and not as a saleable subject" and held that no allowance could be claimed on newly added rolling stock which had not required any repair As the law stands in the United Kingdom, the allowance for depreciation is determined entirely at the discretion of the Commissioners In

(33) 1 Tax Cases 487

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(33) 1 Tax Cases 487

practice, however, standard rates of depreciation have been fixed in most cases by the Board of Inland Revenue for the guidance of the General and Special Commissioners Though the courts cannot interfere with the adequacy or otherwise of the rates, there is provision for the question to be referred to a Board of Referees if the representatives of a particular trade desire it [Rule 6 (7) of Cases I and II of Schedule D]

Even in the United Kingdom where the allowance for depreciation is in the discretion of the Commissioners, the system of allowing the actual cost of Repairs and Renewals instead of a provision for wear and tear is of doubtful legal validity, and rests on the mutual consent of the Crown and the assessee and the convenience that it affords both In India also, to the extent that such practice is followed, it is outside the law Under the law, a *fixed* allowance prescribed by the Rules has to be given, which has nothing to do with the actual expenditure on Renewals See however notification under section 60 permitting Railways and Tramways to claim at their option the actual cost of Renewals and Replacements

Successor to business—Unabsorbed depreciation—Original cost on which depreciation to be allowed—

In *Massey & Co, Ltd* v *Commissioner of Income tax, Madras*[34] it was decided that when a person succeeds to a business he is entitled to carry forward for the purpose of his assessment the unexhausted depreciation allowance of the predecessor The depreciation allowance due to the successor should, therefore, be worked out on the original cost to the predecessor and not on the value at which the successor takes over the plant, etc This view was against the previous practice of the Income tax Department, which was based on a strict interpretation of the expression "original cost to *the assessee*" The Court followed *Scottish Shire Line, Ltd* v *Lethem*[35] and opined that there was no material difference between the corresponding provisions in the English Act and those in the Indian Act, and that the departmental interpretation was inconsistent with section 26 It will be observed that the above ruling applies to cases of succession, and cases of ordinary purchase, there being no succession under section 26, will presumably be regulated with reference to the cost paid by the person under assessment

Depreciation—Computation of—

The original block of machinery, and each block constituted by a year's additions, should be treated as separate units

(34) 6 Rang 175
(35) 6 Tax Cases 91

on each of which depreciation should run independently so that block after block in chronological order is eliminated, each after its full value is written off, from the original cost on which depreciation is based

Onus of proof—

Unless the prescribed particulars (See Rule 9) have been furnished to the Income tax Officer no depreciation can be claimed The *onus* of proof as to the correctness of the particulars furnished will, as in almost everything else, rest upon the assessee Depreciation allowances being on a percentage basis, the assessee should furnish the prime cost of each item [36]

Concerns newly assessed—Accumulated depreciation—

When a concern that has been in existence for some years becomes liable to income tax for the first time, depreciation should apparently be allowed not with reference to the value of the plant, etc, on the date on which it so becomes liable, but with reference to the original cost of the plant, etc, to the assessee The latter cost would ordinarily be higher than the value at the time the concern became liable to income tax Such concerns could not, however, claim the benefit of accumulated depreciation under the proviso to section 10 (ii), since the proviso clearly contemplates that the income was taxed in previous years Cases of this kind can, however, seldom arise

Additions to plant during the year—

The law is silent as to the extent to which depreciation is to be allowed in respect of additions during the previous year In the absence of any express provision to the contrary, the assessee is probably entitled to depreciation for the whole year

Buildings let to employees—

Depreciation should be allowed on buildings used for the purpose of the business Whether they are so used or not is a question of fact It is a reasonable presumption that they are, if they are let out without rent to employees If rent is paid, it will depend on the facts of the case how far the buildings are used for the purpose of the business If they are not so used, section 9 applies

Unabsorbed depreciation—Partners of a registered firm—

In the case of the *Ballarpur Collieries*, the Judicial Commissioners of Nagpur have decided that a partner in a registered firm can, under section 24, set off his share of unabsorbed depreciation against his own individual profits or income under other heads or in other businesses

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(36) *Ramanatha Reddiar v Commissioner of Income tax*, 6 Rang 175

It seems to follow from the above that when the firm is assessed in the next year, it cannot claim to bring forward the unabsorbed depreciation the benefit of which has been allowed to the partners by way of set off under section 24

In *Suppan Chettiar's case*, the Madras High Court observed that under the accepted principles of construction a proviso should not be taken by mere implication to withdraw any part of the main provision (*West Derby Union v Metropolitan Life Assurance Society*)[36a] The proviso in section 10 (2) (*vi*), therefore, gives only an additional alternative to the assessee and does not take away his right of deducting the depreciation even though such deduction will merely swell the loss under the business Further, according to the construction put on the words "any business" in section 10 (1) in *M Ar Arunachallam Chettiar v Commissioner of Income tax, Madras*,[37] all the businesses of the assessee taken together should be taken as a single unit for the purpose of applying the provisions of section 10 The Punjab High Court went further and decided in *Karam Ilahi Muhammad Shafi's case*[38] that unabsorbed depreciation can be set off under section 24 against profits under other heads of income

Profits earned partly outside British India—Depreciation—How computed—

In respect of assessees with profits accruing partly in British India and partly outside, the problem of depreciation is somewhat complicated If the assessee furnishes annual accounts for the whole business, the second method of rule 33 could be applied The 'world profits' should evidently be calculated for the business under the Indian law, *i e*, deductions not permitted in India but permitted in other countries should be added back and deductions admissible in India allowed On this 'world profits' depreciation should be allowed according to the Indian law, *e g*, allowance being made for unabsorbed depreciation of previous years, etc, and of the net income, the fraction $\frac{\text{British India receipts}}{\text{Total receipts}}$ should be taken as the net taxable income in British India (without, of course, a further allowance for depreciation)

The same arrangement also applies to obsolescence

This problem of depreciation and obsolescence is complicated in respect of businesses like those of shipping companies

(36 *a*) 1897 A C 647
(37) 1 I T C 278
(38) 3 I T C 456

If the companies keep accounts not by the year but by 'trips', and the trade is entirely in Indian waters, the problem is simple Otherwise some equitable method of computation has to be followed, the law not making any explicit provisions as to the computation *See* also paragraphs 88 and 89 of the *Income tax Manual*

Bank—Securities held by—Depreciation of—

A banking concern claimed, in computing its profits, to deduct the amount of depreciation of war bonds and securities belonging to it arrived at by comparing the market rates at the time of closing the accounts with the original price paid for the bonds *Held*, that the deduction was inadmissible

Per *Macleod C J*— From the gross income only certain debits for depreciation are to be allowed and this debit asked for by the Bank not being mentioned therein cannot be allowed I think this was the obvious intention of the Legislature since while depreciation of machinery plant and buildings can easily be calculated as provided in the Act it would be a very different matter to have to enter into such calculations with regard to assets other than these But this much is clear that if the profits of a business are to be calculated according to the legal definition of profits that method of calculation must be continued from year to year and an assessee would not be allowed to write down his assets in a year when market values had declined without writing them up when values had increased [39]

A bank claimed to deduct the depreciation in certain securities held by it on the ground that the securities represented money lent to Government just like money lent to the bank's customers As the bank held these securities not with the object of dealing with them as stock in trade from day to day in the ordinary course of business but as an emergency reserve in lieu of cash, it was held that the investments were part of the fixed Capital as distinguished from the floating Capital of the bank, and that therefore the deduction on account of depreciation was inadmissible [40]

In *Scottish Investment Trust Co* v *Forbes*[41] it was held that the net profit made by an investment trust company during the year by realising investments at higher prices than they were bought for, should be taxed even though in the books this profit had been set off against the depreciation of other securities which the company possessed

In all such cases, if the business of the Bank or Company was to trade or deal in shares or securities, such depreciation

(39) In re *Tata Industrial Bank* 1 I T C 15"
(40) *Punjab National Bank* v *Commissioner of Income tax* 2 I T C 184
(41) 3 Tax Cases 231

would be automatically allowed, inasmuch as the shares or securities would be treated as stock in trade and valued at cost price or market price, whichever was lower

Machinery let—Depreciation on—

It is a condition under this clause that the machinery, etc, should be the property of the assessee It follows therefore that if the machinery, etc, are leased, the allowance cannot be claimed by the lessor because he does not carry on the business Nor can the lessee who carries on the business, claim any allowance because the machinery, etc, are not his property—see, however the case of *Mangalagiri Factory* cited *infra* Under clause (5) of rule 6 under Cases I and II of Schedule D to the English Income tax Act, the lessor, in a case of this kind, would be entitled to an allowance on account of depreciation, if under the terms of the lease he was to maintain and restore the machinery, etc Similarly, the lessee would be entitled to treat the machinery, etc, as his own if under the lease he was to maintain and restore the machinery, etc But it should be remembered that the allowance for 'wear and tear' in the United Kingdom covers both depreciation and repairs, for which separate allowances are given in India

The allowance of obsolescence, however, stands on a different footing and should obviously go to the owner or lessor in all cases, because a claim for obsolescence can occur only once in the life time of the machinery, etc, and is not of a recurring nature, nor can one ordinarily conceive of the burden of obsolescence falling upon the lessee

Machinery, etc.—Leased—Depreciation allowance—

An English company had some foreign cold storage business which it carried on either directly or through subsidiary companies *The foreign business was transferred to an American* company for a term of years in consideration of certain annual payments to the subsidiary companies, whose shares the parent English company continued to own, receiving dividends therefrom The American company also guaranteed sums necessary to meet the fixed charges of the English company and maintain its dividends The premises, machinery and plant of the foreign business remained the property of the English company, but they were placed under the sole control of, and were used by, the American company for the purpose of carrying on the businesses as it thought fit They were not demised or leased to the American company, and no rent was payable for their use, but the American company was to keep them in proper repair and working order, save as regards all ordinary wear and tear and

damage by fire The English company claimed that, in taxing its profits, deductions should be allowed for the fire insurance premiums paid by it in respect of the premises, and for wear and tear of the machinery and plant, of the transferred business *Held*, that the fire insurance premiums did not represent money wholly and exclusively laid out or expended for the purposes of the trade of the English company, that the machinery and plant in question was not used for those purposes, and that the deductions claimed were accordingly inadmissible

Per *Pollock M R*—' it is not all money that is laid out by the subject but only money which is laid out first of all for the purposes of the trade and secondly laid out wholly and exclusively for the purposes of the trade and unless the expense incurred can be brought within these words which are narrow words the deductions cannot be allowed It is quite plain that the intention of the Legislature was not to make a broad general rule that whatever a subject likes to expend in his business could be deducted but only such sums were to be allowed to which the character could be assigned that they had been wholly and exclusively laid out for the purposes of the subject s business

The principle which is invoked is the principle as I say of the *Usher's Wiltshire Brewery Company Limited*[42] and I think it is important that one should just see what rule was intended to be laid down in that case Up to that time the ruling decision was the one in *Brickwood & Co, Limited* v *Reynolds*[43] The decision there was that the repairs which were executed by brewers to their tied houses in which their beer was sold could not be allowed as a deduction from the profits and gains of their trade in arriving at the true figure to be returned for the purposes of Income tax and what Lord Justice Smith said there was this It is true they incurred the expense upon these tied houses and it is true in one sense they are useful to the trade in respect of which the return to Income tax is made but he said by doing the repairs to the tied houses they keep up and foster the trade of the publican which is a wholly independent trade wholly independent of the brewers trade and he adds at the end of his judgment the expense was incurred for many other things one being the purposes of the trade of the publicans who occupy these houses *Brickwood* v *Reynolds* therefore took the view that this sort of expenditure inasmuch as it was expenditure which inured or might be considered to inure to the benefit of somebody else s trade and not the trade of the subject making the return inasmuch as that was the case no deduction could be claimed successfully in respect of money expenditure for that sort of trade a trade which did not immediately concern the subject making the return

The House of Lords in *Usher s Wiltshire Brewery Company Limited* overruled the case of *Brickwood* v *Reynolds* and they said that the deduction may be allowed in cases where the payment or expenditure is incurred for the purposes of the trade of the subject that has

(42) 6 Tax Cases 399
(43) (1898) 1 Q.B at page 95 (3 Tax Cases 600)

made the return and it does not matter that this payment may inure to the benefit of somebody else to the benefit of a third party if it primarily inures and was incurred and laid out for the purposes of the trade of the subject making the return then it is within the clause relating to deduction

I think that it would be a very serious mistake and very misleading if the principle of the *Usher's Wiltshire Brewery case* was to be supposed to be this if you can find that the expenditure has been made on commercial lines advantageously for the purpose of the business if you are able to say that then you are entitled to apply the rule in the *Usher's Wiltshire Brewery case* and to secure any deduction I do not think that rule was intended to be laid down so widely you would have to scrutinise the expenditure very narrowly to find out whether it was laid out for the purpose of the subject s trade and then ask the second question—was it laid out wholly for the subject's trade and exclusively for his trade?' [44]

Plant—Leased by company—Depreciation on—

In Commissioners of Income tax v Mangalagiri Sri Umamaheswara Gin and Rice Factory,[45] the assessees, who were a limited company, elected not to work their mill but to let it out to other persons who worked it *Held* by the Madras High Court that the assessees used the factory for the purpose of the business—not of working it but of leasing it—and that deduction for depreciation was admissible

This decision is at first sight in conflict with that *In re Kaladan Suratee Bazar Co, etc* [46] The *ratio decidendi* of the Madras case is not clear but it would seem that the High Court based their decision on the fact that the assessees were a company and that the Articles of Association contemplated the mill being let out if the company did not want to work the mill—*see* particularly Krishnan, J 's judgment Perhaps also a distinction is sought to be made between the letting of buildings and the letting of machinery and plant The Court evidently did not contemplate that any assessee who let houses could claim to carry on the *business* of letting houses

Harbour—Silting up—Clearance of—

A Harbour Board charged by statute with the duty of maintaining a harbour, which included a part of a river bed deepened to give access to ships, claimed to deduct as "wear and tear of machinery and plant" or 'repairs to premises', expenses incurred in dredging out accumulated silt *Held*, that (*a*) the harbour was not 'plant or machinery' nor was the silting "wear

(44) *Union Cold Storage Company Ltd v Jones* 8 Tax Cases 738
(45) 2 I T C 251
(46) 1 I T C 50

and tear", (b) if the expenditure incurred on removing the silt was admissible at all as expenditure "on repairs of premises", it should be deducted from profits in the year actually incurred, and no part of it could be set off against earnings in other years

Per *the Lord President*—"A Harbour bed is neither plant nor machinery Nor is silt "wear and tear" Next the deduction was sought to be justified as "Repairs on premises" For my part and speaking for myself alone I am equally unable to accept that view According to the ordinary use of language, and we are not dealing here with technical phraseology to dredge out silt from a harbour cannot be accurately or even intelligibly described as making 'repairs on premises' The Revenue however considered that the outlay was "applicable to maintenance"[47]

In India, of course an exact case of this kind could not arise, as harbour boards are 'local authorities' and therefore exempt under section 4 (3) (iii) But the principle underlying the decision can be applied to docking companies, etc In this case of the *Dumbarton Board*, the Crown was prepared to concede that the expenditure in question could be charged to revenue, and the Court did not therefore give a decision, though the Lord President said,

' It was plainly capital expenditure just as much as the cost of originally making the harbour '

Railway—Renewals allowed—No further depreciation admissible—

In the case cited below, the Commissioners refused to grant an allowance for depreciation, on the ground that there was no diminution of value on account of wear and tear, the sums allowed in respect of repair, and renewals having been sufficient to meet the loss by wear and tear They also refused to grant any allowance under the section for depreciation of new plant which had not yet been in need of repair The decision of the Commissioners was confirmed

Per *Lord Gifford*—'The Company cannot get deduction for deterioration twice over first by deducting the actual expense of repair and renewal and then by deducting an additional estimate for the same thing Nor will it do as the Railway Company urge to make a distinction between old and new plant, and to deal with the old plant in one way and with the new in another I think the same principle must be applied to both[48]

In this case it was obviously open to the Crown to have disallowed the deduction on account of renewals and allowed a deduction for wear and tear, but the Revenue, evidently as a matter of convenience, both to the assessee and to the Revenue, allowed the cost of renewals as a deduction

(47) *Dumbarton Harbour Board v Cox*, 7 Tax Cases 147
(48) *Caledonian Railway Company v Banks* 1 Tax Cases 487

Tramways—Renewals allowed—No further depreciation admissible—

The London County Council acquired some horse tram ways, and reconstructed them for electric traffic At the time of reconstruction only a part of the track was completely worn out, the average unexhausted life of the horse rails replaced being eight years Under an arrangement agreed to by the Crown and the Council it had been the practice to allow as a deduction from profits the cost of the actual renewals in each year The Council claimed that the deduction, under the practice, should not be restricted to the cost of renewal of the rails wholly exhausted (as conceded by the Crown), but should include an allowance for the partial exhaustion of the remainder of the track which had been reconstructed Failing this they asked that the assessment should be amended by allowing the depreciation during the year *Held,* that no question of law was involved, that, accepting the practice, the Council were not entitled to more than an allowance for renewal of the lines which had been completely worn out, and that they were not entitled to have the case reheard on a different principle [49]

Stallion—Depreciation—Inadmissible—

The assessee owned two stallions at stud and was assessed in respect of the profits from the stallion fees He contended that in the computation of these profits for income tax purposes he was entitled to a deduction by reason of the diminished value of the stallions year by year *Held,* that the claim could not be allowed

Per *Rowlatt J*—"Now those words authorise such deduction as the Commissioners may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant I do not know whether a horse used for traction comes within that or whether it does not, but I am clearly of opinion that the diminished value of a breeding animal, merely due to the fact that having lived a year it is a year nearer its end is not within this section You ned not take only the case of an animal you may take the case of the value of a prolific tree You have here an article which you are not wearing out by use You have got an article whether it be an animal or a vegetable art cle the life of which is only a limited term of years As the years go on you take the produce and the repro duction of the animal or the tree or whatever it is dies or is killed because it is no longer worth keeping That diminished value by the efflux of time does not seem to be diminished value by reason of wear and tear, it is simply diminished value because you have invested your money in a source of production which is a wasting source of production " [50]

(49) *London County Council* v *Edward* 5 Tax Cases 383

(50) *Earl of Derby* v *Aylmer,* 6 Tax Cases 665

(vii) in respect of any machinery or plant which, in consequence of its having become obsolete has been sold or discarded, the difference between the original cost to the assessee of the machinery or plant as reduced by the aggregate of the allowances made in respect of depreciation under clause (vi) or any Act repealed hereby, or the Indian Income-tax Act 1886, and the amount for which the machinery or plant is actually sold, or its scrap value,

Law in the United Kingdom—

For quite a long time there was no provision in the English law permiting a deduction for obsolescence, and the earlier English decisions disallowing claims for obsolescence are now obsolete The law at present is practically the same as in this country except that obsolescence can be claimed in respect of plant and machinery used in a profession—*see* notes under section 11

History—

The words "in consequence of its having become obsolete" were inserted before "sold or discarded", in 1922 Formerly the expression was "has been sold or discarded as obsolete" In *Secretary, Board of Revenue, Madras v S R M A R Ramanathan Chettiar,*[12] it was contended on behalf of the assessee that the words "as obsolete" governed only 'discarded' and not 'sold' and that a loss on account of sale otherwise than for obsolescence should be allowed as a deduction The Court did not admit the contention It held that, as the statute was punctuated, it was open to it to take punctuation marks into account, and that the absence of a comma after 'sold' made it clear that the words "as obsolete" governed both "sold" and "discarded" Besides, the provision for only one kind of capital loss would have been queer in a statute which ignored both capital profits and capital losses throughout The present wording of the section, it will be seen, removes the ambiguity

Original cost—Succession to business—

In view of the ruling in *Massey & Co 's Case* set out under clause (*vi*), the original cost to the assessee is evidently the cost paid by the predecessor who originally bought the plant or machinery for the business and not the price paid by the successor to the predecessor

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(12) 1 I T C 244

Saleable but not sold—When claim arises—

In respect of machinery and plant discarded but not sold, the claim for obsolescence can be allowed only in the accounting year in which the machinery or plant is discarded[3] The claim will be allowed on the basis of scrap value But if such a claim is not made in the accounting year in which the plant or machinery is discarded, the claim will nevertheless be admissible if and when the plant or machinery is sold In that case also the claim can only be made in the accounting year in which the sale takes place If an assessee has been given the allowance on the basis of scrap value and afterwards, *i e*, in a later year, gets a better price than the scrap value, he cannot, presumably, be taxed on the difference between such price and the scrap value on which obsolescence allowance was originally given by the Income tax Officer

Buildings—

No obsolescence allowance is admissible for buildings, nor indeed for anything except plant and machinery See also *Rao Bahadur Laxminarayan v Commissioner of Income tax, Central Provinces*[3a]

Obsolescence—Question of fact—

Obsolescence is a question of fact to be determined by the income tax authorities Whether the machinery has in fact become obsolete on account of subsequent improvements in the business and whether it was really sold or discarded for this reason are obviously questions of fact See *Secretary, Board of Revenue, Madras v S R M A R Ramanathan Chettiar*[4]

Plant, etc, when to be discarded—

In 1923 the assessee decided to discard as soon as convenient certain machinery which had become obsolete Trade was bad and the machine was not actually replaced till September 1926 when it broke down It was *held* that the assessee was entitled to the benefits of section 10 (2) (*vii*)[5]

Destruction—Not obsolescence—

Loss due to destruction, whether accidental or otherwise, is not obsolescence[6] Plant or machinery discarded because it is

(3) *Radha Kishen & Sons v Commissioner of Income tax* 3 I T C 73
(3a) 3 I T C 269
(4) I I T C 244
(5) *Commissioner of Income tax United Provinces v Swadeshi Cotton Mills Cawnpore* (Allahabad High Court), 3 I T C 244
(6) *Commissioner of Income tax, Madras v Pattan Singh* 2 I T C 107 and 294.

wornout is not entitled to obsolescence allowance[6a] Obsolete machinery means machinery which, though it is able to perform its function, has become in common parlance out of date and performs its function so indifferently or at such a cost that a prudent man, instead of continuing to use such machinery, would discard it and instal more modern and more labour saving machinery

For a thing to become obsolete it is not necessary that it should be worn out, nor that it should not be useful to other people in the same business who are less progressive in their methods On the other hand, merely because a person wants better plant and machinery, not because his old plant, etc, had been superseded by improvements, but because he wants something better than his competitors have, it cannot be said that the plant is obsolete The question of obsolescence is therefore one of degree and consequently a question of fact[7]

Obsolescence—Change of business—Inadmissible—

A claim for 'obsolescence' can arise only if the machinery becomes unsuitable or out of date for the purpose for which it was originally intended It cannot be allowed if machinery is discarded owing to a change in the character of the business, *e g*, a munition factory adapting itself to ordinary engineering work Malony, C J, said that the word 'obsolete' meant—

"out of use of a discarded type or fashion for the particular purpose for which it was intended and cannot apply to a case where the machinery remains suitable but there is no occasion for its use

Samuel, J, said that the word means

"worn out degenerated or out of date as machinery for the purposes for which it was originally installed[8]

Obsolescence—Change of place of business—

Fittings in a clothiers business are not ordinarily plant they may be 'furniture' and there is no question of obsolescence if the fittings have to be discarded because the place of business is changed[9]

(vii-a) in respect of animals which have been used for the purpose of the business otherwise than as stock in trade and have died or become permanently useless for such purposes, the difference between the original cost to the assessee of the animals and the amount, if any realised in respect of the carcasses or animals

(6 a) In re *Sheodayal Jagannath Brijraj* (Calcutta High Court), unreported

(7) *South Metropolitan Gas Co* v *Dadd*, 6 A T C 983

(8) *Evans & Co* v *Phillips*, 4 A T C 520

(9) *Hyam* v *Inland Revenue*, 8 A T C 275

History—

The clause was inserted by Act III of 1928 It is doubtful if draught animals and other livestock are 'plant'—see *Earl of Derby v Aylmer*[10] set out under section 10 (2) (vi); but they are analogous to 'plant' and it was therefore thought desirable to give some concession in respect of them In the Bill as published, the allowance was proposed only in respect of animals replaced because of death or disablement and to the extent of the difference between the original cost to the assessee and the value of the carcasses or the discarded animals But the clause as passed by the Legislature makes the allowance independent of replacement Also the word 'realised' was substituted for "realised or realisable" in the original Bill

(viii) any sums paid on account of land-revenue, local rates or municipal taxes in respect of such part of the premises as is used for the purposes of the business,

Allowance on account of rates or taxes—

Section 10 (2) (viii)—The allowance under this clause covers only the land revenue and local rates or municipal taxes paid in respect of the portion of the *premises* used for the purposes of the business In assessing income from business a local rate or tax which is payable irrespective of whether profits are made or not, should be treated as expenditure incurred *solely* for the purpose of earning profits or gains within the meaning of section *10* (2) (ix) if the rate or tax is not an admissible deduction under section 10 (2) (viii) No allowance can be given on account of any other rates or taxes whatsoever *All* rates and taxes therefore whether levied on the profits of a business or charged on the proprietor of a business in respect of anything other than the actual portion of the premises used for the purposes of the business, must be disallowed (*Income tax Manual*, para 48)

See also notes under section 12

Sir George Lowndes pointed out in 1918 (when the then Act was discussed in the Legislative Council) —

'Municipal taxes are a purely personal expense You may have a house with water laid on, municipal water, and if you pay rates for it, that is paying for something in addition to the house Supposing you have no water laid on you have to provide it otherwise The man who gets water from a Municipality will be allowed the municipal tax, the other who does not get it, will receive no allowance As far as I can understand it, that is what my honourable friend means It is almost an absurdity These local rates are just like personal expenses, for which we do not allow abatement of income tax. They are like the

(10) 6 Tax Cases 665

expenses for servants motor cars clothes or anything of that sort Expenditure on such things as municipal scavenging etc are treated as purely personal expenses and are not allowed in England We do not propose to allow it out here

There is a distinct rule under Schedule D in the English Act prohibiting the deduction of personal expenses

Deductions on account of taxes paid—

No deduction is permissible in computing the income profits or gains on account of any taxes or rates paid in respect of such income profits or gains except that a local rate or tax which is payable irrespective of whether profits are made or not (*see* para 48) is to be allowed as deduction from income from business Section 10 (2) (*viii*) of the Act allows as a deduction from business profits sums paid on account of land revenue local rates or municipal taxes in respect of premises used for the purposes of a business This specific provision has been inserted because the local rates paid on account of such premises are usually in the nature of a payment for services rendered (*e g* by supply of water conservancy arrangements etc) but that allowance is closely restricted to a local tax or rate levied *in respect of the premises* used for the purposes of the business No deduction is allowed for any other local rate or tax such as for example local taxes varying according to the income or profits of a business Nor is any deduction on account of a local rate or tax on property allowed from the annual value of property which is taxable under section 9 Similarly no allowance is permissible on account of income tax or super tax paid by an assessee Where property profits or gains are liable to taxation in other countries or by other authorities in British India all these authorities are taxing the same property or profits for different purposes Attention is invited to the ruling of the High Court at Patna (Jyoti Prasad Singh s case *infra*) in which it was held that the amounts paid for cesses by a person deriving an income from rents of collieries and from royalties on the amount of coal raised from the collieries are not to be deducted in computing the amount of his assessable income and in which it was clearly stated that

the payment of a tax which is conditional on the making of an income and which has to be calculated on the amount of such income after it has come into existence cannot be said to be expenditure for the making of such income (*Income tax Manual* para 53)

Previous law—

Under the 1918 Act the whole tax was deductible even if only a part of the premises was used for the business The proviso to clause (*ix*) of this sub section inserted by Act III of 1928, prohibits the allowance of local rates based on profits

Cesses based on Income—

In In re *Raja Jyoti Prasad Singh Deo*[11] the Patna High Court held that road, public works and similar cesses paid on income from royalties are not admissible deductions

(11) 1 I T C 103

charge upon the profits at all The answer is that it is The income tax is a charge upon the profit, the thing which is taxed is the profit that is made, and you must ascertain what is the profit that is made before you deduct the tax—you have no right to deduct the income tax before you ascertain what the profit is I cannot understand how you can make the income tax part of the expenditure " Per *Halsbury, L C* in *Ashton Gas Co* v *Attorney General*[21]

See also the case of the *Eastern Extension Australasian, etc , Telegraph Company* set out under section 42

Profits include tax payable—

In *Johnston* v *Chestergate Hat Manufacturing Co*[22] in which a manager was entitled, under an agreement, to a salary plus a share in the net profits, 'net profits' being defined in the agreement to mean 'the net sums available for dividends as certified by the auditors of the company after payment of all salaries rent, interest at the rate of 5 per cent per annum on the capital and after making such allowance for depreciation as the auditors may advise', it was held by *Sargant, J*, that income tax was part of the profits, and could therefore not be deducted from the profits in settling the share due to the manager But the agreement could have expressly provided that the income tax should be deducted before ascertaining the share due to the manager in which case, of course, the position would have been different

Foreign taxes—

As regards foreign taxes paid, the practice in the United Kingdom has been to allow such taxes as business expenses, though there is no express legal provision to that effect—see *Stevens* v *Durban Roodepoort Gold Mining Company*,[23] but not if there is an arrangement for Double Income tax Relief In India, the position is as below If the income is entitled to Double Income tax Relief—whether under section 49 (United Kingdom) or under section 60 (Indian States)—it should be computed in the manner laid down in this section, *i e*, foreign taxes should not be deducted unless covered by clauses (*viii*) and (*ix*) and proviso of this sub section If the income is not entitled to Double Income tax Relief, the question of computation of income will seldom arise since what is taxed in British India is the actual amount of profits brought in *See* section 4 (2) It will arise only when it is necessary to allocate the profits so brought in as between the last three years and the preceding years, and

(21) 1906 A C 10

(22) (1915) 2 Ch 338

(23) 5 Taxes Cases 402

when it arises, the profits must be computed as laid down in this section, i e, with reference to clauses (viii) and (ix) and proviso of this sub section

(viii-a) Any sum paid to an employee as bonus or commission for services rendered, when such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission

Provided that the amount of the bonus or commission is of a reasonable amount with reference to—

(*a*) the pay of the employee and the conditions of his service,

(*b*) the profits of the business for the year in question, and

(*c*) the general practice in similar businesses

History—

This clause was inserted by Act XXIII of 1930 It renders the Madras High Court ruling in *R E Mahammad Kasim Rowther's case,* 2 I T C 482, obsolete The exemption from double taxation given by Notification No 8, dated 24th March, 1928 (*see* section 60), however, still continues and applies to cases not covered by this clause

Scope—

The object of this clause is to allow only *bona fide* payments, and these various conditions are set out to secure this object The condition in the substantive part of the clause is intended to prevent partners of firms and dominent shareholders in private companies from abusing this concession The conditions in the proviso will prevent collusive deductions in combination with employers

(ix) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains

Provided that nothing in clause (*viii*) or clause (*ix*) shall be deemed to authorise the allowance of any sum paid on account of any cess rate or tax levied on the profits or gains of any business or assessed at a proportion of or otherwise on the basis of any such profits or gains

History—

The main part of the clause has been coming on from 1918, the proviso was introduced by Act III of 1928 The object of the proviso is explained by the following paragraph in the *Statement of Objects and Reasons* —

The Calcutta High Court have held that road cess levied on coal mines is an admissible deduction from the assessable profits of the mine The cess though nominally levied on immoveable property is actually calculated with reference to the annual profits of the mines It is therefore a tax on profits and generally speaking anything that is of the nature of a tax on profits is not allowed as a deduction in assessing income tax Moreover the Central Government have always contended that provincial or local taxes on profits should not take precedence of Central taxes on the same profits and if this principle is sacrificed serious loss to Central revenues may result Clause 2 (*b*) of the Bill makes it clear that an assessee is not entitled to deduct in computing income any sums paid to a local authority in respect of any tax (cess rate etc) assessed on the basis of profits even though it may be nominally imposed on immoveable property

The ruling in the *Isabella Coal Company s case*[24] is therefore obsolete

General construction—

It will be seen that this clause (*ix*) overlaps some of the previous clauses, with the exception of depreciation which is not an actual but only a notional expense, and of obsolescence which can arise only when the machinery is discarded or sold, all the other expenses set out in the previous clauses are undoubtedly incurred solely for the purpose of earning the profits Nor can any of them be capital expenditure It would seem therefore that this clause should be construed to refer only to those expenses—not being items referred to in the previous clauses, and not being capital expenditure—which are incurred solely in earning the profits Otherwise we shall have the absurdity of the same allowance being claimed twice over Nor would it seem right to hold that an assessee had the option to claim a deduction either under this clause or under one of the previous clauses In this view the restrictions and conditions imposed in the previous clauses become a nullity and the proper construction it is submitted, is one that does not so make the previous clauses a nullity

A somewhat different view, however, was taken in *Rattan Singh v Commissioner of Income tax*[25 26] by the Madras High Court It was held that the reliefs in the several clauses of sub

(24) 2 I T C 87
(25 26) 2 I T C 294

section (2) were disjunctive and cumulative, and that if a deduction falls expressly within the words of any one of the clauses, the Crown could not withhold the deduction on the ground that the assessee had already received a larger benefit under another clause The Court accordingly held that the cost of certain renewals, which were neither current repairs under clause (*v*) nor capital expenditure, should be allowed as a deduction under clause (*ix*) even though the depreciation allowance granted under clause (*vi*) is precisely meant to cover such renewals It is submitted that the distinction between repairs and renewals is one of degree, that according to commercial practice repairs are revenue expenditure and renewals capital expenditure, and that the difficulty contemplated by the Madras High Court cannot arise By holding that the expenditure in the particular case was not capital expenditure, they held in effect that the expenditure was on current repairs, though they did not say so

The cases under this sub section fall broadly into two classes (*a*) what is capital expenditure, (*b*) when is expenditure incurred solely for earning the profits Under the latter class again there is such a large number of decisions that it has been thought convenient to arrange them by groups relating to cognate subjects Attention is also invited to the rulings set out under section 11 (Professional earnings) and section 12 (Other sources)

As regards what is capital expenditure, see also the Introduction and notes under section 3 Broadly speaking, it is the deduction of expenditure on fixed capital that is prohibited, not that on circulating capital By express legislation, the fund transferred to trustees by an employer at the time of recognition of his employee's provident fund has been deemed to be capital expenditure *See* section 58 K

"Broadly speaking outlay is deemed to be capital when it is made for the initiation of a business or for a substantial replacement of equipment"—Per *Lord Sands* in *Commissioners of Inland Revenue v Granite etc Steamship Co*[27]

Per *L P Clyde* in *Lothian Chemical Co v Rogers*[28]—"It is according to the legitimate principles of commercial practice to draw distinctions and sharp distinctions between capital and revenue expenditure and it is no use criticising these as it is easy to do upon the ground that if you apply logic to them they become more or less indefensible They are matters of practical convenience but practical convenience which is undoubtedly embodied in the generally understood principles of commercial accounting"

(27) 6 A T C 678

(28) 11 Tax Cases 508

Per same Judge in *Rorbank Printing Co v Commissioner of Inland Revenue*[29]— I know of no standard for making the vital but often delicate distinction between a revenue charge appropriate to form a deduction from trading receipts and a capital charge which ought not to enter into the ascertainment of trading profits except the standard set up by the prudence and experience of merchants'

As regards what is meant by "incurred solely for earning the profits" it is impossible to definite it, though it occurs in the Acts of other countries It is clear, however, that counter advantages of an indirect kind do not make moneys spent moneys incurred solely for earning the profits[30]

A sum of money expended not of necessity and with a view to a direct and immediate benefit to the trade but voluntarily and on the grounds of commercial expediency and in order indirectly to facilitate the carrying on of the business may yet be expended wholly and exclusively for the purposes of the trade —Per *Cave L C* in *Atherton v British etc Cables*[31]

Mr Justice Rowlatt a Judge of great experience and learning in Revenue matters has frankly said that he does not see his way to give a general definition of the true construction of the section but that he is content to say about each case as it comes along whether in his view it falls within the section[32]

In the earlier English decisions, the tendency was to take an unduly strict view of what constituted expenditure for earning profits Thus, in regard to advertisements

' I am not aware that there is any authority whatever for any deduction of any expenses whatsoever incurred after the beer is produced and really to promote or increase its sale[33]

It follows from this that expenditure on advertisements could not be allowed as a necessary expense for earning the profits The Chief Baron imported the idea of 'necessarily' into the words 'wholly and exclusively' (corresponding to 'solely' in the Indian Act) The word 'necessarily' occurs only in Schedule E in the United Kingdom [corresponding to section 4 (3) (vi) in India] In later decisions, however, culminating in *Usher's case*[34] this strict view was departed from though *Watney v Musgrave* has not been definitely overruled

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(29) (1928) S C 701 13 Tax Cases 864
(30) See per Sargant L J in *Union Cold Storage v Jones* 8 Tax Cases 725
(31) 10 Tax Cases 155
(32) *Per* Coutts Trotter J in *Board of Revenue v Munuswami Chetti & Sons* 1 I T C 233
(33) *Per* Kelly C. B. in *Watney v Musgrave* 1 Tax Cases 272
(34) 6 Tax Cases 399

Expenditure—Whether incurred solely for the earning of profits—Question of fact—

Per *Scrutton, J*—" . . It seems to me that the question whether money is wholly and exclusively laid out or expended for purposes of a trade is a question of fact Judges of the High Court may know, by *the accident of their previous training, something about a particular trade* Merely to take a personal instance I should be assumed to know something about shipping but there are many trades about which I should know absolutely nothing whatever, and there are equally many trades about which any of my learned Brethren would know nothing whatever except what they were told by the Commissioners, and in many cases the question whether the money was wholly or exclusively laid out or expended for the purposes of the trade must depend upon a knowledge of the facts of the trade, of the way in which it is carried on, of the effect of payments made in that trade all of which are questions of fact There may be cases where it is clear even to a Judge who knows nothing about the trade that a particular payment could not be wholly or exclusively laid out for the purposes of the trade I do not desire to go into politics but I take examples which seem to me fairly clear Payments for political purposes might conceivably be for the purposes of trade It might be that a payment by a company to the Tariff Reform League might be of great advantage to its trade It might be that a payment by a company to a political party which was supposed to be identified with the interests of a particular trade might be to the advantage of the trade, but one can easily imagine cases such as a payment by a company to the National Service League, where it would be impossible to conceive that anybody could find that such money was wholly or exclusively laid out or expended for the purposes of the trade *There may be cases in which the Court would have to say there is no* evidence on which any tribunal could find that this sum was laid out or expended for the purposes of such trade but in most cases it appears to me that it depends on the facts of the trade of which the Court has no knowledge, and *for which it must depend on the findings of the* Commissioners "[35]

A somewhat different opinion was held by Sir Samuel Evans in the Court of Appeal in *Usher's Wiltshire Brewery v Bruce*[36] in which he said that a finding of fact would by no means settle the question to be determined, and that when the facts are found, the proper inference to be drawn in order to determine whether the disbursements or expenses were wholly and exclusively laid out for the purposes of the trade or concern within the meaning of the provisions referred to, is a question of law, but this was considered to be an *obiter dictum* by Scrutton, J,

(35) *J H Smith v Incorporated Council of Law Reporting for England and Wales*, 6 Tax Cases 484

(36) (1914) 2 K.B 601

in *Smith* v *Incorporated Council of Law Reporting, cited supra* Sir Samuel Evan's judgment was ultimately reversed by the House of Lords, *see* per *Lord Sumner*—

"The effect of this structure, I think is this that the direction to compute the full amount of the balance of the profits must be read as subject to certain allowances and to certain prohibitions of deductions but that a deduction if there be such which is neither within the terms of the prohibition nor such that the expressed allowance must be taken as the exclusive definition of its area, is to be made or not to be made according as it is or is not on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of profits of it [37]

After reviewing various authorities the Master of the Rolls said in *Morley* v *Tawford & Co* [38]—' After looking at these cases with some care it appears to me that the solution of the problem (*i e*, whether an expenditure is wholly and exclusively laid on for the trade, etc) must in some cases be determined as a question of fact On the other hand there may be some cases in which it is a mixed question of fact and law and it is in all cases a question of law whether there was any evidence at all on which the conclusion reached by the Commissioners or by another Court can be sustained

General scope of the clause—

As already stated, it is primarily a question of fact how far a particular item of expenditure is necessary for earning the profits [39] There is still a large amount of case law on the subject as the succeeding pages will show

The answer in each case depends on the nature of the business, commercial practice and the nature of the expenditure, having regard to the circumstances of the case It is not therefore possible to enumerate what would or would not be admissible deductions under clause (*ix*) All that can be given is a few general examples which are illustrative of the general principle Thus, advertisement charges would be allowed if they are incurred for selling the goods in the ordinary course, but if a special campaign of advertisement is launched, say, for expanding the business or floating a new company or extending the activities of the business in absolutely new directions the expenditure would be disallowed In practice, however, the law is perhaps more leniently administered Taking legal expenses, for example, expenditure on acquiring a patent or any new asset or goodwill or the like would not be an admissible deduction, whereas the same expenditure incurred in defending a patent, would be

(37) 6 Tax Cases 399

(38) 72 S J 8°5 45 T L R 30 140 L T 125, 14 Tax Cases 229

(39) See *per* Lord Sumner in *Usher s Brewery case*, 6 Tax Cases 399

allowed Expenses for fighting the liability to income tax would not be allowed, as the expenditure is by no means necessary for earning the income that is the subject of charge Bonuses to employees, pensions, salaries, boarding and lodging expenses for employees, clothing for them, would all be allowed as deduction Fees paid to Accountants and Auditors would be allowed if paid for normal work, that is, the every day work of the business, but not if paid for special work by way of floating new capital, etc Expenditure on development, prospecting, etc, would not ordinarily be allowed, as they are essentially of a capital nature Similarly, in regard to expenditure on removal from one premises to another, alterations of buildings, plant, machinery, etc, expenditure on fixtures and fittings The primary test would be whether the expenditure was unusual or not But in all these matters, practice is usually more lenient than the law Embezzlements stand in a peculiar position Embezzlement by or through the carelessness of an employee in the course of business would be allowed as a deduction, but not money lost through the person responsible for the business—see *Curtis* v *Oldfield* [40] Loans lost would be allowed if the giving of such loans was an integral part of the business, but not otherwise Broker's charges would be allowed, if for selling goods or securing orders, but not for raising loans or underwriting the issue of capital In India, royalties paid for patents are a permissible deduction In England, they are not allowed to be deducted but the person paying the royalty is entitled to deduct tax from the person receiving the royalty

Insurance on account of theft, accidents, etc, would all be allowed in most cases, always subject to the condition that the loss when realised from the insurance company, is paid into the profit and loss account Damages paid would or would not be allowed according as they were paid in the ordinary course of business or not It is usually a difficult question to decide whether damages paid is capital expenditure or not In this respect also practice is more lenient than the law

Correlation of profits and expenditure with reference to time—

Such profits refer to the profits earned by the business generally and not to the profits of a particular year on which a particular assessment is levied This is obvious because expenditure necessarily precedes the earning of the profits and much of the profits of one year must be earned by the expenses incurred in the previous year or years [41]

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(40) 9 Tax Cases 319

(41) *Per* Macleod C J—In re *Tata Iron and Steel Co* 1 I T C 131

I do not feel any difficulty in rejecting the suggestion made by the learned Advocate General that the profits referred to in the clause must mean the profits of one particular year in which the expenditure in question is incurred There is no such limitation in the section and in the absence of any words indicating such a limitation it is clear that the contention cannot be accepted —Per *Shah J* (*Ibid*)

See also the *Vallambrosa case*[4] set out under section 2 (1) in which it was held that expenditure on maintaining rubber trees was an admissible deduction even though the trees may not yield any profits in a particular year

Per *Rowlatt J* in *Naval Colliery Co v C I R*[43] — the profits for income tax purposes are the receipts of the business less the expenditure incurred in earning those receipts Receipts include debts due and they also include at any rate in the case of a trader goods in stock Expenditure includes debts payable and expenditure incurred Repairs the running expenses of a business and so on cannot be allocated directly to corresponding items of receipts and it cannot be restricted in its allowance in some way corresponding or in an endeavour to make it correspond to the actual receipts during the particular year If running repairs are made if lubricants are bought of course no inquiry is instituted as to whether those repairs were partly owing to wear and tear that earned profits in the preceding year whether they will not help to make profits in the following year and so on The way it is looked at and must be looked at is this that that sort of expenditure is expenditure incurred on the running of a business as a whole in each year and the income is the income of the business as a whole in each year without trying to trace items of expenditure as earning particular items of profit

Nevertheless there may be items which are clearly traceable to particular accounting periods *e g* reconditioning the mines in this very case reserves to meet future expenditure

Securities owned by business assessees—

The profits that are earned by the expenditure in question are the profits that are brought into charge though in certain circumstances expenditure may be charged against profits even though it may not relate to the income actually earned in the year of charge—See the *Vallambrosa case*[4] *Ounsworth v Vickers*[44] *Hancock case*,[45] *Tata Iron & Steel Co s case*[46] No deduction may be claimed on account of expenditure incurred in earning income that is not brought into charge The most im

(4?) 5 Tax Cases 5?9
(43) 136 L T ?8 138 L T 593 1? Tax Cases 1017
(44) 6 Tax Cases 671
(45) Tax Cases 358
(46) 1 I T C 131

portant example of this kind is income derived by a Bank or similar concern that buys Tax free Securities with borrowed funds While there is no doubt that the assessee, in such cases, is not entitled to deduct from his profits the interest paid by him on the capital borrowed and invested in the tax free securities, it is always a somewhat difficult question of fact to single out the particular capital that has been borrowed for the purpose

Unexecuted contracts—Acquisition of—Price paid for—Whether 'capital' expenditure—

A part of the business acquired by a company consisted of unexecuted contracts The company claimed that the price paid for such contracts should be deducted in assessing the profits arising out of the execution of the contracts *Held*, that the price paid was capital expenditure and could not therefore be deducted[47] This was followed by the Court of Appeal in the *Alianza case*[48] and approved by the House of Lords in *John Smith v Moore, infra* (Lord Finlay dissenting, who thought that the facts could be distinguished)

The assessee acquired as part of a business certain unexecuted contracts left by his father for the supply of coal to him at favourable prices The value of these contracts was estimated by Chartered Accountants at £30,000 which the assessee actually paid for Later on, the price of coal rose very high and the assessee made huge profits The question arose whether the £30,000 should be deducted from the profits as the purchase price of the stock in trade and the House of Lords (by a majority) negatived the assessee's contention that the sum should be deducted[49]

Per *Viscount Haldane*—"

> profit may be produced in two ways It may result from purchases on income account the cost of which is debited to that account and the prices realised therefrom are credited or it may result from realisation at a profit of assets forming part of the concern In such a case a prudent man of business will no doubt debit to profit and loss the value of capital assets realised and take credit only for the balance the appellant had brought as part of the capital of the business his father s contracts These enabled him to purchase coal from the colliery owners at what we were told was a very advantageous price He was able to buy at this price because the right to do so was part of the assets of the business Was it circulating capital?

(47) *City of London Corporation v Styles* 2 Tax Cases 239 (C A)
(48) 5 Tax Cases 172
(49) *John Smith & Son v Moore* (1921) 2 A C 13, 12 Tax Cases 266

My Lords it is not necessary to draw an exact line of demarcation between fixed and circulating capital Since Adam Smith drew the distinction in the Second Book of his *Wealth of Nations* which appears in the chapter on the Division of Stock a distinction which has since become classical economists have never been able to define much more precisely what the line of demarcation is Adam Smith described fixed capital as what the owner turns to profit by keeping it in his own possession circulating capital as what he makes profit of by parting with it and letting it *change masters The latter capital circulates in this sense*

My Lords in the case before us the appellant of course made profit with circulating capital by buying coal under the contracts he had acquired from his father's estate at the stipulated price of fourteen shillings and reselling it for more but he was able to do this simply because he had acquired among other assets of his business including the goodwill the contracts in question It was not by selling these contracts of limited duration though they were it was not by parting with them to other masters but by retaining them that he was able to employ his circulating capital in buying under them I am accordingly of opinion that although they may have been of short duration they were none the less part of his fixed capital That he had paid a price for them makes no difference

On the other hand *Lord Finlay* who was in the minority said

If the amount of coal which they represented had been in stock in yards belonging to the coal dealer it could not have been disputed that the price paid for it would have been a proper deduction as against the price realised by the resale It can make no difference for this purpose that the coal dealer followed the more convenient practice of having contracts with the collieries and despatching it from the pit's mouth *straight to his customers There is not here any provision of* coal for a long time ahead—there is no purchase of a colliery from which the coal is to be extracted—that is merely provision in the only convenient way for the stock required up to 31st December 1915 from 7th March 1915 There is nothing in the nature of capital expenditure in the purchase of the stock wanted for resale during the current year

The coal represented by the contracts was circulating capital It was bought for use in the business and was so used At one stage of the argument in this House an attempt was made to distinguish the case of contracts for coal from the case of coal already delivered and stored *in a coal dealer's yards and* the Lord Justice Clerk in part rests his judgment in favour of the Crown upon the distinction between goods and choses in action such as contracts for coal This distinction seems to me to be for this purpose untenable The contracts gave the means of getting coal and there is no difference for this purpose between having coal stored in your yard and having a contract which enables you to get it from time to time as you want it This indeed was admitted by the Lord Advocate in argument when he was asked the question specifically by Lord Haldane If the Crown is entitled to disallow what

the appellant had to pay for these contracts it would be equally entitled to disallow as a deduction the price paid for coal actually in stock

For the present purpose these coal contracts are not distinguishable from the coal which they represent

The contracts cannot be regarded either in whole or in part as a fixed asset like a coal mine they are merely the machinery for getting coal and the coal which they commanded is the article by the resale of which the applicant made his profit A contract for delivery of certain quantities of coal at a certain price may be made in consideration of a bonus paid when the contract is entered into in which case the price to be paid on delivery would be somewhat lower or it may be constituted simply by the price to be paid on each delivery In each case the whole amount so paid represents circulating capital the coal which the purchaser means to resell The purchaser does not resell the contracts he uses them from time to time as he requires coal for resale Where there is no bonus paid it would not I suppose be suggested that there was any element of fixed capital in such contracts How can the payment of a bonus affect the case? The only difference is that the price which the mine owner is content to take and the coal dealer to pay is in the first case made up by a bonus on entering into the contract and the amounts paid on each delivery while in the other case it consists simply in the payment of a larger amount as the price payable on each delivery

Viscount Cave, who was in the majority put the case on different grounds

The £30 000 was not paid by the firm for coal nor was it paid by the trading firm as such for coal contracts it was paid by John Ross Smith out of his private pocket as part of an overhead transaction under which the business with its assets and future profits passed into his hands and it left the trading profits of the firm unaltered

If I buy the crop of an orchard in a particular year for £20 and sell it for £40 my profit is only £20 But the profit of the orchard is £40 and in comparing the produce of the orchard in that year with its produce in another year it is the £40 and not the £20 that must be taken into account

I may add that the contrary view would lead to strange results If John Smith jun had lived until the end of 1915 it is clear that he would have earned the profits assessed and would have had to pay the duty claimed Can it be that because he dies in March and the business and business assets were transferred to his son upon terms involving a payment of £30 000 for one of the assets the assessable profit was reduced by that amount? If so then if John Smith jun had lived for another six months and had then died the contracts being still unperformed the contracts might then have been valued at £60 000 and the assessable profits would have been reduced by that sum And upon the same showing if John Smith jun instead of dying had at some time in 1915 converted the business into a company the company paying

£30 000 or a larger sum for the coal contracts the company would have been entitled to deduct the whole purchase money paid for those contracts from its assessable profits and John Smith jun if he had held all the shares of the company would have received the whole profit freed to that extent from Excess Profits Duty I cannot think that this is th true meaning and effect of the Act [50]

Fixed capital and circulating capital—

What is circulating capital and what is fixed capital is a question which in many cases may well embarrass the businessman and the accountant as well as the lawyer According to some of the definitions the same asset may be fixed capital in one company and circulating capital in another [1]

Per *Rowlatt J* in *Rees Roturbo Development Syndicate v Commissioners of Inland Revenue*[2]—

In one sense the words capital asset are words of art because you do not have one set of assets representing capital and another set of assets representing income but what is meant is that this is an asset which represents fixed capital as opposed to circulating capital that is to say that this is an article which is possessed by the individual in question not that he may turn it over and make a profit by the sale of it to his advantage but that he may keep it and use it and make a profit by its use For instance if a bank or a mercantile company finds it is more *expensively housed than it needs*, and sells its country house and its offices that is not part of the business of banking

Per *Rowlatt J* in *Thomas v Richard Evans & Co*[3]—
money may be capital expenditure of the person who pays it and the income of the person who received it '

Thus the cost of machinery purchased by a business would ordinarily be expenditure on fixed capital from its point of view but the same machinery would be part of the stock in trade *i e*, the circulating capital of the manufacturer of machinery

Goodwill—Fixed capital—

It is necessary however to consider whether the depreciation in goodwill and leases is to be treated as loss of fixed capital or of floating or circulating capital Depreciation of goodwill seems to me to be loss of fixed capital It closely resembles the loss which a railway company might be said to sustain if it were found that a line which had been made say ten years ago at a certain cost could now be

(50) *John Smith & Son v Moore* (1921) 2 A C 13 12 Tax Cases 266

(1) *The Ammonia Soda Co Ltd v Arthur Chamberlain and Others* (a case under the Companies Act) (1918) 1 Ch 266 (C A)

(2) 6 A T C 597

(3) 5 A T C 551

made for a very much smaller amount and consequently would not yield, if it were sold, the price expended in making it'[4]

Transfer of business—Consideration for—

When the Royal Insurance Company acquired the business of the Queen Insurance Company, it was also provided in the agreement of transfer that the manager of the latter company should be taken into the service of the former, at a salary But liberty was reserved for the Royal Insurance Company to commute the salary by payment to the manager of a gross sum on the basis of the Company's Annuity Tables, subject however to the condition that he should not at any time accept office under any other fire or life insurance company Shortly after the transfer of the business the Royal Insurance Company paid the manager the commuted value of his annual salary The Company claimed to deduct this lump sum from the taxable profits *Held,* that this payment formed part of the consideration for the transfer of the business, and therefore, being capital expenditure, could not be deducted[5] The consideration paid to another Bank in return for the transfer of a right to issue notes is not deductible, since it is capital expenditure[6]

Contracts—Cancellation of—Compensation for—

A company, which owned a ship, contracted for the construction and purchase of a new ship for the sum of £226,000 of which £30,000 was payable on the signing of the contract, and the balance by instalments as the building of the ship progressed Before any substantial progress had ben made, a heavy slump in trade occurred, and the company cancelled the contract by payment, to the builders, of £60,000, including the £30,000 already paid *Held,* that the payment of the whole of the £60,000 was in the nature of capital expenditure, and was not an admissible deduction in the computation of the profits of the company for income tax purposes[7]

If, on the other hand, the contract was one for goods or stock-in-trade (as distinguished from capital goods like a ship), presumably the compensation would be an admissible deduction

See also the cases cited under section 3 as to when such compensation is a capital receipt and when not

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(4) *Wilmer* v *M'Namara & Co Ltd* (a case under the Companies Act)

(5) *Royal Insurance Company* v *Watson* 3 Tax Cases 500

(6) *London Bank of Mexico* v *Apthorpe* 3 Tax Cases 143

(7) *"Countess Warwick" Steamship Company, Limited* v *Ogg,* 8 Tax Cases 652

A Marine Insurance Company *claimed to deduct from* its profits a sum of money paid as compensation for cancelling contracts to build ships which it had ordered but did not require The Commissioners were not satisfied with the explanation offered as to the object of the transaction It was held that on the facts the loss was not a trading loss, *i e*, that dealing in ships was no part of the business of the company[8]

Colliery—Lease—Foreclosure of—

A Company whose business was not to trade in mining licences but to win coal got rid of an onerous licence involving the payment of a heavy dead rent and a minimum royalty by *paying a lump sum to the lessor* *Held* that the payment was capital expenditure (*Staveley Coal Co v Mallett*[8a]) Whether you acquire an asset by the expenditure, whether it is debited to Profit and Loss Account, whether it is recurrent or not—though helpful tests are not conclusive If you redeem an annual recurrent business expenditure by a commuted lump payment, such payment can be deducted (see *Hancock's case, infra*), but if you pay something now to avoid losses in future years, the payment is analogous to a loss of fixed capital In this case what really happened was that the company disposed of a burdensome capital asset

Following the above ruling it was held in *Cowcher* v *Richard Mills, Ltd* that the lump sum consideration paid to the landlord as compensation for the premature surrender of a lease of certain shops which had to be closed, was capital expenditure

Recurring capital expenditure—

Whether a recurring payment is merely an instalment of a Capital debt or a Revenue expenditure depends both on form and on substance An annual rent would be clearly a Revenue charge but if a contract is made under which the assessee secures the right to use the land for a certain number of years and a lump sum is fixed as the consideration for this right but payable in annual instalments, such payments would be Capital charges See *Commissioner of Inland Revnue* v *Adam, S C*, (Lord Blackburn dissenting)[9]

Colliery—Surface land—Restoration of—Capital expenditure—

A Colliery Company undertook *either to restore* to an arable condition all land occupied by the Company, etc, or to pay the lessor for land not so restored, at so many year's purchase of the agricultural value of the land The Company paid

(8) *Devon Mutual Steamship Insurance Asociation* v *Ogg* 6 A T C 1010
(8a) 13 Tax Cases 772 (C.A)
(9) 7 A T C 397, 14 Tax Cases 34

a lump sum under the option *Held,* that the payment was capital expenditure

Per *the Lord President*—"It seems to me that on the question of the capital or revenue character of the cost of restoration or of the compensation payable for land damaged or not restored it makes no difference whether the company had acquired the property or a servitude right at the commencement of the lease in consideration of a price paid or whether they merely acquired a personal right for the duration of the lease upon condition that they paid for it at the end of the lease by restoring the land to its original condition or by paying the value of the land if it was not restored[10]

Colliery—Restoration of seams—

If a seam is allowed to get into a non profit earning condition, expenditure incurred in getting it back into a working condition is capital expenditure, on the other hand expenditure on keeping up a seam continuously in a profit earning condition is revenue expenditure It is all a question of degree[11]

Repairs—Accumulated—

In re *King's Lynn Harbour Mooring Commissioners,*[12] the Court upheld the contention of the Mooring Commissioners that money applied in the repayment of debts previously incurred in the renewal of works necessary for carrying the income was deductible The later decisions about capital expenditure cited below are however decidedly against the view in this decision

Ships—Newly purchased—Accumulated repairs of—

The expense laid out in keeping a ship which is employed in trade in proper repair is certainly an expense necessary for the purposes of the trade It is made for the purpose of earning the profits of the trade Repairs may be executed as the occasion for them occurs or if they are such as brook delay they may be postponed to convenient season but in either case they truly constitute a constant recurring incident of the continuous employment of the ship which makes them necessary They are therefore an admissible deduction in computing profits[12a]

"But the accumulated repairs on account of purchasing a ship in disrepair are capital expenditure and may not be admitted as deductions" (*Ibid*)

A company owned a single steamship which was seized and used by the Germans during the War The ship was returned to the owners after the War, and heavy repairs were

(10) *Robert Addie & Sons Collieries v Commissioners of Inland Revenue,* 8 Tax Cases 671

(11) *United Collieries Ltd v Commissioners of Inland Revenue* 8 A T C 52?

(12) 1 Tax Cases 23

(12a) Per *the Lord President* in *Law Shipping Co v Commissioners of Inland Revenue,* 12 Tax Cases 621

found necessary for reconditioning it The company received compensation from the German Government Since the compensation was clearly of the nature of damages and not of the nature of freight for the period of use by the Germans, and the reconditioning was not in the course of the daily business of the company, it was held that the cost of reconditioning could not be *deducted from the company's profits*

Per *Lord Sands*—"It is clear that if the respondents had purchased another dilapidated ship and reconditioned her, the expense of such reconditioning would have been held to be capital outlay (*Tav Shipping Co*, 12 Tax Cases 621) Does it make any difference that the ship which they so treated was their own old ship of which they had *recovered possession after 4½ years?* I come to the conclusion that it makes no difference and I do so on the grounds that the respondents had not been in possession of the ship for 4½ years, had not during that time handled or traded with the ship and that the dilapidations which had to be made good were not dilapidation suffered by the ship in the course of the respondents' trading with her "[13]

The cost of reconditioning coal mines, pumping and restoring pit props as a consequence of damage resulting from the stoppage of work during a prolonged strike was held to be a capital loss by the Court of Appeal (Sargant, L J, dissenting) [14]

'The loss even if made good out of revenue, is not a revenue loss the injury to the mine is an injury to a fixed capital asset "—Per *the M of R Hanworth*

"It was an existing loss chargeable against the profits of the period in which it was made and liable to be defrayed in the ordinary course out of any moneys that might come to their hands in the succeeding period It was throughout an income loss '—Per *Sargant, L J*

Reserves—Future repairs—

A corporation which purchased gasworks in a defective structural condition was held not to be entitled to deduct sums set aside annually to be expended in later years on restoring the plant and apparatus to its proper condition [15]

Accumulated Royalties—

In *Maharajadhiraj of Darbhanga* v *Commissioner of Income tax*,[16] the Patna High Court allowed as a deduction from the taxable profits of the successor, the accumulated arrears of royalties that had mounted up during the time of the predecessor in business The royalties were not a personal liability of the

(13) *Commissioners of Inland Revenue* v *Granite, etc, Steamship Co* 6 A T C 678
(14) *Naval Colliery Co* v *Commissioners of Inland Revenue*, 6 A T C 331
(15) *Clayton* v *Newcastle Under Lyme Corporation*, 2 Tax Cases 416
(16) 4 I T C 283

predecessor, and further mining operations could not be effected except on the payment of these royalties

New shares—Underwriting—Cost of—

Where a Joint Stock Company increases its capital by the issue of new shares for which it pays commission to the underwriters of the shares, the commission so paid cannot be allowed as a deduction In re *Tata Iron and Steel Company*[17] (*The Texas Land and Mortgage Company* v *Holtham*,[18] and *Royal Insurance Company* v *Watson*[19] followed)

Debentures—Issue of—Cost of—Commission to Brokers—

A mortgage Company raised money by the issue of debentures, and lent it at a higher rate of interest *Held*, that the commission paid to brokers, and the other expenses incurred in raising the money cannot be deducted [18]

Lease—Renewal of—Premium—

A premium for the renewal of a lease for five years was held to be capital expenditure in *MacTaggart* v *Strump* [20]

Per *Lord Cullen* — The distinction between capital and revenue expenditure is very elusive, and is more formal than real and whether expenditure for a particular purpose is capital expenditure or revenue expenditure may depend as has often been said upon the mode in which the expenditure is made Here I think that (a trader) would regard it as a payment of capital which he had in unusual circumstances been forced to make although as a matter of ordinary prudence he would probably see to it that this depletion of his capital was made good gradually out of his profits when earned '

Premium—For lease—Exhaustion of—Allowance for—

A brewer paying a premium for the lease of a public house, for the purpose of letting it to a tenant under covenant to buy beer brewed by him, is not entitled to a deduction on account of the gradual exhaustion of the premium [21]

Cost-book Mine—Sinking new shaft—Cost of—

A call was made upon the shareholders of a Cost book Mine, for the purpose of sinking a new shaft, and the concern claimed to deduct the amount expended on such sinking The Commissioners allowed the claim, as they were of opinion that in the case of a Cost book Mine there was no such thing as capital,

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(17) 1 I T C 195

(18) 3 Tax Cases 255

(19) (1897) A C 1 3 Tax Cases 500

(20) 4 A T C 455

(21) *Knowles* v *McAdam*, 1 Tax Cases 161, distinguished, *Watney & Co* v *Musgrave* 1 Tax Cases 272

and that there could be no profit in working such a mine until every expenditure had first been met *Held*, that the Commissioners were wrong, and that the question, whether the expenditure in respect of which a deduction was sought was capital or not, was one of fact, and the case was accordingly sent back to the Commissioners to ascertain the facts

Per *Wright J*— The real question is Is the expenditure in respect of which a deduction is sought to be made capital or not? That must be to a great extent or may be to a great extent, a question of fact One can very well imagine in cases of mines where the minerals lay at shallow depths and where it was necessary to open them out from time to time frequently by shallow shafts that in those cases it might well be that the sinking of shafts would be properly treated as part of the ordinary working expenditure On the other hand you have a case such as I suppose the present case is where a large area of ground has been worked from one shaft and it is apprehended that it will soon become impossible to work any further from that shaft and a new mine so to speak must be opened by a new shaft altogether

Per *Collins J*— It seems to me that on the authority of *Addie's case*[22] expenditure in sinking a shaft would be capital expenditure and it is possible to conceive of cases in which the making of a shaft having regard to the lie of the minerals and the very small length of the shaft might be described as working expenditure [23]

A 'cost book' mine is one in which the owners, who form a common law partnership, run the mine jointly, without keeping any Capital Account, the excess of expenditure over receipts being borne by the partners as a capital loss and the excess of receipts over expenditure being distributed as profits

Colliery—Sinking pits—Cost of—

A deduction is not ordinarily allowable for expenses of pit sinking

Per *Earl Cairns*— I am not prepared to say that a mine owner might not in some cases be entitled to an allowance in respect of the cost of sinking a pit by means of which the minerals are gotten which are the source of profit"

Per *Lord Blackburn*— I do not wish to lay down any general proposition either that money expended in sinking pits can never be in the nature of expenses incurred in working the coal so as to be properly taken into account in estimating the profits made or to say what if any the circumstances are under which it may be done [24]

(22) 1 Tax Cases 1

(23) *Morant v Wheal Grenville Mining Company* 3 Tax Cases 298

(24) *Coltness Iron Co v Black* 1 Tax Cases 287, *Knowles v McAdam* 1 Tax Cases 161 overruled

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Now I can come to no other conclusion but that this was an investment of capital in the Welsh Company and was not an ordinary trade transaction of an advance against goods [29]

In *Jacobs Young & Co v Harris*[30] it was held that if a principal company sank its money in a subsidiary company and the latter lost its money the loss was to the former a loss of capital and not a deductible expense The point is that it is not the 'trade' of the principal company in which the loss occurs

A company manufacturing fountain pens formed a subsidiary company for the manufacture of a low grade pen The issued capital of the new company was wholly subscribed for (except for one share) by the sole director of the parent company who also became sole director of the new company The new company was suddenly required by Government to make trophie parts and there was delay in the receipt of moneys from Government The parent company went on making loans to the new company and eventually took over its business A part of the advances was written off and the company also repaid the director the capital subscribed by him The question arose whether these amounts could be deducted from taxable profits *Held* that there was no evidence to justify the findings of the Commissioners that the deductions were admissible[31]

The taking over of a large stock of goods at an inflated price from a subsidiary company merely to avert the latter from disaster cannot cause a trading loss but only a capital loss to the parent company when the goods are ultimately written down that is, the loss cannot be deducted[32]

Allied business—Advances—Bad debts—

A Brewery Company granted loans to their customers on the security of Public houses If the security did not realise the amount of the loan the Company wrote off the loss as a bad debt *Held* that in arriving at the profits of the Brewery

(29) *Engl C ou Sp lt r C B L* Tax Ca s 3?

(30) ? A T C 3 11 Tax Cas s ? 1

(31) *I ker v Mab e Todd & Co Ltd* 13 Tax Cases 3?

(32) *Co ss on rs of Inland Re nue v Hun ley Ialner Ltd* ? A T C 3?

Per Lord Shaw — ' ... there is no obligation upon the company immediately to cut down and remove the timber or indeed to do so at any specific date their rights with regard to the timber being co extensive in time with the currency of their leases The case is thus removed in fact from an analogy with decisions in which a sale of standing timber was coupled with the duty of its instant removal from the ground ... the transaction under which these timber rights were acquired was not one under which a mere possession of goods by a contract of sale was given to the appellant company, but was one under which they obtained an interest in and possession of land So long as the timber at the option of the company, remained upon the soil it derived its sustenance and nutriment from it The additional growths became *ipso jure* the property of the company All rights of possession necessary for working the business of cutting or even for preserving uninjured the standing and growing stock of timber were ceded under the leases All this together with the business facilities for removal and sale was granted to the company which thereby became invested with the possession of and an interest in the land ... It has long been the law of the United Kingdom that the exhaustion of capital, however it might be treated on strict actuarial principles or according to certain principles of economics may for the purpose of taxation be treated as profit The profit may be temporary, and so when it ceases the capital may be gone, and with the going of the capital there will also go the subject and the possibility of the tax ... The law—so clearly stated with regard to the working of coal and nitrates, and settled upon a broad general principle—is in no way different when it comes to be applied to timber bearing lands The principle as to the true reason for holding that such timber rights are of the nature of possession of, and interest in the land itself has long been settled

Advances to Subsidiary Company—Loss of—

A Company carried on the business of zinc smelting, for which purpose it required large quantities of "blende" To supply the "blende" a new Company was formed, which from time to time received assistance from the old Company in the form of advances on loan The new Company proving unsuccessful, and going into liquidation, the amount due from it to the old Company, was written off as a bad debt *Held*, that the advances were an investment of capital, and that the loss was not deductible in arriving at the profits of the old Company for assessment

Per Bray, J — Wh[illegible]t you have to [illegible] is whether, in common parlance it is capital [illegible]nditure, that is to s[illegible]y an expenditure on a count of capital a[illegible] [illegible]diture which on th[illegible] ordinary profit and loss account, would not [illegible] [illegible] debit at all [illegible] [illegible]ould appear as a debit when you are dealing [illegible] [illegible]ts [illegible] this were an ordinary business transaction of [illegible] [illegible] by which [illegible] [illegible]elsh Company were to deliver certain blende at [illegible] at prices to [illegible] [illegible] hereaf[illegible]r and that was really nothing [illegible] an ad[illegible] [illegible] of [illegible] price of

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(29) *English Crown Spelter Co* v *Baker* 5 Tax Cases 327

(30) 5 A T C 753 11 Tax Cases 221

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(32) *Commissioners of Inland Revenue* v *Huntley Palmer, Ltd*, 7 A T C 393

Per Lord Shaw—" there is no obligation upon the company immediately to cut down and remove the timber, or indeed to do so at any specific date, their rights with regard to the timber being co-extensive in time with the currency of their leases The case is thus removed in fact from an analogy with decisions in which a sale of standing timber was coupled with the duty of its instant removal from the ground the transaction under which these timber rights were acquired was not one under which a mere possession of goods by a contract of sale was given to the appellant company, but was one under which they obtained an interest in, and possession of, land So long as the timber, at the option of the company, remained upon the soil, it derived its sustenance and nutriment from it The additional growths became *ipso jure* the property of the company All rights of possession necessary for working the business of cutting or even for preserving uninjured the standing and growing stock of timber were ceded under the leases All this, together with the business facilities for removal and sale, was granted to the company which thereby became invested with the possession of and an interest in the land It has long been the law of the United Kingdom that the exhaustion of capital, however it might be treated on strict actuarial principles or according to certain principles of economics, may for the purpose of taxation be treated as profit The profit may be temporary, and so when it ceases the capital may be gone, and with the going of the capital there will also go the subject and the possibility of the tax The law—so clearly stated with regard to the working of coal and nitrates, and settled upon a broad general principle—is in no way different when it comes to be applied to timber bearing lands The principle as to the true reason for holding that such timber rights are of the nature of possession of, and interest in the land itself, has long been settled "

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(32) *Commissioners of Inland Revenue* v *Huntley Palmer, Ltd*, 7 A T C 323

Company, for assessment to income tax, the Company are entitled to deduct the amount of such losses or bad debts[33]

Referring to *Watney v Musgrave*, Pollock, B, said

"There were some observations made by the Lord Chief Baron (Kelly) who, possibly, had not before him all the cases that might possibly arise in the future, which might militate against the decision which he gave As far as those observations are concerned, they are not binding upon us and I am quite certain they would not have been made had the learned Lord Chief Baron had such a case before him"

In order to establish a new source of supply, a paper-maker in the United Kingdom advanced money to a wood pulp manufacturer in Canada, the money bearing interest and being repayable gradually when supplies were made During the war the British Government stopped the import of wood pulp and the Canadian firm disclaimed all liability in respect of the advance *Held* that the advance was in the nature of capital expenditure[34]

Allied concerns—Shares allotted with insufficient consideration—

Though ordinarily a company may be presumed to get an adequate *quid pro quo* for its share capital which it allots, the shares are not really fully paid up if after making fair and reasonable allowance for conflicting views as to values there is a substantial discrepancy between the value of the shares allotted and the value of the consideration received in return Therefore where a company allots its shares for a consideration much below its face value the consideration will, for the purpose of calculating profit and loss for income tax, be estimated at its real value and not at the face value of the share exchanged for it, and the difference between the face value and the real value of the consideration cannot be claimed as a loss of the company *Trustees Corporation v Commissioner of Income tax*[35] The above decision of the Bombay High Court was confirmed by the Privy Council [35-a] The High Court sought to found the decision on *In re Wragg, Ltd*, but the Privy Council thought that that ruling had no relevancy and confirmed the decision of the High Court on the bare ground that the so called transactions of purchase and sale were illusory

Allied business—Payments to—

A Company (A) had an agreement with another Company (B) carrying on a similar business, under which it obtained, in

(33) *Watney v Musgrave* 1 Tax Cas s 2 [illegible] *Co, Ltd v Male*, 3 Tax Cases 279

(34) *Charles Marsden & Sons v Comm[illegible]* [illegible] Tax Cases 217

(35) 3 I T C 105

(35-a) 57 I A 152, 54 Bom 437, [illegible] M L J [illegible] (P C)

return for an undertaking to make up the yearly profits of Company (B) to a certain amount, a commanding interest in its management Company (A) claimed to deduct, in computing its yearly profits for income tax purposes, the payment made to Company (B) under the terms of this agreement The Commissioners found that the payment was made by Company (A) for the purpose of its trade so that it might sell its goods at a better price, and therefore allowed the deduction *Held,* that the question was one of fact rather than of law and that the deduction had rightly been allowed [36]

Per *the Lord President* —' it all depended on whether this expenditure was really an outlay to earn profit or was an application of profit earned Well that is a question of fact

Per *Lord M'Laren* — If the payment made to the affiliated Company could be regarded as charity my opinion would be that it was a payment out of income and that it was subject to income tax But mercantile companies are not in the habit of subsidising competing companies from motive of benevolence Such a payment would not be a legal application of the shareholders money and in the absence of evidence or an admission to the contrary effect I think it is a just legal inference that the payment in question was a payment made for the advancement of the respondents business and with a view to augmenting its capital or its income As this is an annual payment it would as a matter of accounting be regarded as a payment made with a view to the increase of income and would be properly entered in the annual accounts The Commissioners have found in fact that the payment was with a view to earning larger profits *ibid*

Per *Lord Pearson* —' But the statute does not require the party claiming the deduction to show that any profit was in fact earned by the expenditure in question It is enough that it shall have been laid out for the purposes of his trade as this expenditure clearly was But then it must be laid out wholly and exclusively for these purposes and it was argued that the agreement was at least in part for the benefit of Wilsons Ltd It may have operated to their benefit But we have to do only with Stewarts and Lloyds part of it and even with that not as a definite source of ascertainable profit but as inferring the expenditure of the sum of money here in question for the purposes of their trade I think it clear that from their point of view the expenditure was made for those purposes and for no other *ibid*

Lump sums received in commutation of annual charges—Investment of—

A cemetery company received lump sums in commutation of the annual charge for the keep of lairs in perpetuity and invested such sums as capital *Held* that such sums are not a

(36) *John Moore v Stewarts and Lloyds Ltd* 6 Tax Cases 501

the whole cost of removal out of revenue. In calculating their profits, the Company claimed a deduction for the expenses of carting granite from the old yard to the new, and of taking down and re erecting two cranes *Held*, that these items were not allowable deductions

Per *Lord McLaren*—"I think that the cost of transferring plant from one set of premises to another more commodious set of premises is not an expense incurred for the year in which the thing is done, but for the general interest of the business It is said, no doubt, that this transference does not add to the capital value of the plant, but I think that is not the criterion There are costs that would not properly be set against the income of the year and which yet may not add to the capital value Suppose a person is imprudent enough not to insure his premises or his goods which can be insured and they are burned down and he has to replace the building he could not be allowed to charge the new building against the income of the year although the putting up of it does not add to the value of his property but merely enables it to maintain its original value I agree therefore that the cost of re-erecting the cranes and the cartage of materials being a thing not done for the benefit of the one year is not a proper deduction from income "[48]

This decision was approved by L C Cave in *British Insulated & Helsby Cables* v *Atherton*[49]

In order to extend its business, a Company opened a manufactory and fitted machinery, but subsequently closed it, removed a portion of the machinery, and re opened the manufactory on a smaller scale, and thereby lost a portion of the original expenditure *Held*, that this was a loss of capital, for which deduction could not be allowed[50]

The moving expenses of a travelling business, *e g*, a circus or a travelling butcher, including the cost of closing up at the old and fitting up at the new place, can be deducted from profits, but not if the business is a fitting' (as opposed to a travelling) business Accordingly, in the case of a firm of meat importers and retailers who owned a very large number of shops and constantly opened new shops and closed old ones with the changing circumstances of their business as a whole, it was held that the cost of equipping new shops was capital expenditure[1]

The cost of wholly new fittings in a new place of business is capital expenditure even though the renewal may be compulsory[2]

(48) *Granite Supply Association* v *Kitton*, 5 Tax Cases 168
(49) 10 Tax Cases 155
(50) *Smith* v *Westinghouse Brake Co* 2 Tax Cases 357
(1) *Eastmans* v *Shaw*, 14 Tax Cases 218 (H L)
(2) *Hyam* v *Commissioners of Inland Revenue*, 8 A, T C 275

Per *the Lord President* in *Addie's case*—"Now I am quite clear that the making of a new pit in a trade of this kind is in every sense of the term just an expenditure of capital It is an investment of money, of capital and must be placed to capital account in any properly kept books applicable to such a concern '"[25]

Mine—Shaft—Deepening of—

A mining company claimed as a deduction the cost of deepening a main shaft, the bodies of ore accessible from the original level having been practically worked out *Held,* that there was no evidence on which the opinion of the Commissioners, that the expenditure was proper working cost, could be supported, and that the deduction could not be allowed[26]

Minerals—Exhaustion of—

An English Company owned nitrate grounds in Chili, which, with the factory, machinery, etc, would become useless when the nitrate was exhausted The raw material from which the nitrate was produced was found in natural deposits on the grounds at or near the surface The company claimed that a deduction should be allowed for the cost of the raw material worked up and exhausted each year *Held,* that the deduction in question could not be allowed

Per *Lord Macnaghten*—" It appears to me that it is money wholly and exclusively laid out and expended as capital "

Per *Lord Robertson*— First of all is this capital which he proposes to obtain a deduction for ? Now that my Lords seems to me to be entirely concluded by the findings in the case There is no doubt whatever that the scheme of the enterprise of this Company was to invest their capital in the acquisition of this property and then to proceed to work it as a mining concern

My Lords that being so the Master of the Rolls seems to me to be abundantly justified in saying that this is merely another case where capital has been embarked in a wasting subject matter '[27]

Forests—Depletion of timber in—

In *Kauri Timber Co* v *Commissioner of Taxes*[28]—a New Zealand case—the company acquired certain forests mostly by purchase or by a 99 years lease Under the New Zealand law no deduction may be made from taxable profits on account of loss of capital The question, therefore, arose whether the value of the timber cut down every year could be deducted The Privy Council held that the deduction was not permissible

(25) 1 Tax Cases 1
(26) *Bonner* v *Basset Mines Ltd* 6 Tax Cases 146
(27) *The Alia a Company Ltd* v *Bell,* 5 Tax Cases 172
(28) (1913) A C 771

Per *Lord Shaw*.—" . . . there is no obligation upon the company immediately to cut down and remove the timber, or indeed to do so at any specific date, their rights with regard to the timber being co-extensive in time with the currency of their leases. The case is thus removed in fact from an analogy with decisions in which a sale of standing timber was coupled with the duty of its instant removal from the ground . . the transaction under which these timber rights were acquired was not one under which a mere possession of goods by a contract of sale was given to the appellant company, but was one under which they obtained an interest in, and possession of, land So long as the timber, at the option of the company, remained upon the soil, it derived its sustenance and nutriment from it The additional growths became *ipso jure* the property of the company. All rights of possession necessary for working the business of cutting or even for preserving uninjured the standing and growing stock of timber were ceded under the leases All this, together with the business facilities for removal and sale, was granted to the company which thereby became invested with the possession of and an interest in the land . It has long been the law of the United Kingdom that the exhaustion of capital, however it might be treated on strict actuarial principles or according to certain principles of economics, may for the purpose of taxation be treated as profit. The profit may be temporary, and so when it ceases the capital may be gone, and with the going of the capital there will also go the subject and the possibility of the tax . . The law—so clearly stated with regard to the working of coal and nitrates, and settled upon a broad general principle—is in no way different when it comes to be applied to timber-bearing lands The principle as to the true reason for holding that such timber rights are of the nature of possession of, and interest in the land itself, has long been settled "

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A Company carried on the business of zinc smelting, for which purpose it required large quantities of "blende". To supply the "blende" a new Company was formed, which from time to time received assistance from the old Company in the form of advances on loan The new Company proving unsuccessful, and going into liquidation, the amount due from it to the old Company, was written off as a bad debt. *Held*, that the advances were an investment of capital, and that the loss was not deductible in arriving at the profits of the old Company for assessment.

Per *Bray, J.*—"What you have to see is whether, in common parlance, it is capital expenditure, that is to say an expenditure on account of capital, an expenditure which, on the ordinary profit and loss account, would not appear as a debit at all, but would appear as a debit when you are dealing with assets . . . If this were an ordinary business transaction of a contract by which the Welsh Company were to deliver certain blende, it may be at prices to be settled hereafter, and that this was really nothing more than an advance on account of the price of

that blende there would be a great deal to be said in favour of the appellants But it is quite clear that the Commissioners have not taken that view and it seems to me rightly they have not taken that view It is impossible to look upon this as an ordinary business transaction of an advance against goods to be delivered It is really nothing of the sort The Welsh Company were in this difficulty They had great difficulties in opening their mine they had to expend large sums of money for that purpose and they applied to the appellant Company—the English Company—to lend them money and they lent them money

Now I can come to no other conclusion but that this was an investment of capital in the Welsh Company and was not an ordinary trade transaction of an advance against goods [29]

In *Jacobs Young & Co v Harris*[30] it was held that if a principal company sank its money in a subsidiary company and the latter lost its money the loss was to the former a loss of capital and not a deductible expense The point is that it is not the 'trade' of the principal company in which the loss occurs

A company manufacturing fountain pens formed a subsidiary company for the manufacture of a low grade pen The issued capital of the new company was wholly subscribed for (except for one share) by the sole director of the parent company who also became sole director of the new company The new company was suddenly required by Government to make aeroplane parts and there was delay in the receipt of moneys from Government The parent company went on making loans to the new company and eventually took over its business A part of the advances was written off and the company also repaid the director the capital subscribed by him The question arose whether these amounts could be deducted from taxable profits *Held* that there was no evidence to justify the findings of the Commissioners that the deductions were admissible [31]

The taking over of a large stock of goods at an inflated price from a subsidiary company merely to avert the latter from disaster cannot cause a trading loss but only a capital loss to the parent company when the goods are ultimately written down that is the loss cannot be deducted [32]

Allied business—Advances—Bad debts—

A Brewery Company granted loans to their customers on the security of Public houses If the security did not realise the amount of the loan the Company wrote off the loss as a bad debt *Held* that in arriving at the profits of the Brewery

(29) *English Crown Spelter Co v Baker* 5 Tax Cases 327

(30) 5 A T C 5 11 Tax Cases 1

(31) *Baker v Mabie Todd & Co Ltd* 13 Tax Cases 1

(32) *Commissioners of Inland Revenue v Huntley Baker Ltd* A T C 3 5

Company, for assessment to income-tax, the Company are entitled to deduct the amount of such losses or bad debts[33]

Referring to *Watney* v *Musgrave*, Pollock, B, said

"There were some observations made by the Lord Chief Baron (Kelly) who, possibly, had not before him all the cases that might possibly arise in the future, which might militate against the decision which he gave As far as those observations are concerned, they are not binding upon us and I am quite certain they would not have been made had the learned Lord Chief Baron had such a case before him "

In order to establish a new source of supply, a paper-maker in the United Kingdom advanced money to a wood pulp manufacturer in Canada, the money bearing interest and being repayable gradually when supplies were made During the war the British Government stopped the import of wood pulp and the Canadian firm disclaimed all liability in respect of the advance *Held*, that the advance was in the nature of capital expenditure[34]

Allied concerns—Shares allotted with insufficient consideration—

Though ordinarily a company may be presumed to get an adequate *quid pro quo* for its share capital which it allots, the shares are not really fully paid up if after making fair and reasonable allowance for conflicting views as to values there is a substantial discrepancy between the value of the shares allotted and the value of the consideration received in return Therefore where a company allots its shares for a consideration much below its face value the consideration will, for the purpose of calculating profit and loss for income tax, be estimated at its real value and not at the face value of the share exchanged for it, and the difference between the face value and the real value of the consideration cannot be claimed as a loss of the company *Trustees Corporation* v *Commissioner of Income tax*[35] The above decision of the Bombay High Court was confirmed by the Privy Council[35a] The High Court sought to found the decision on In re *Wragg, Ltd*, but the Privy Council thought that that ruling had no relevancy and confirmed the decision of the High Court on the bare ground that the so called transactions of purchase and sale were illusory

Allied business—Payments to—

A Company (A) had an agreement with another Company (B) carrying on a similar business, under which it obtained, in

(33) *Watney* v *Musgrave*, 1 Tax Cases 272, distinguished, *Peel's Brewery Co, Ltd* v *Male*, 3 Tax Cases 279

(34) *Charles Marsden & Sons* v *Commissioners of Inland Revenue*, 12 Tax Cases 217

(35) 3 I T C 105

(35a) 57 I A 152, 54 Bom 437, 59 M L J 242 (P C)

return for an undertaking to make up the yearly profits of Company (B) to a certain amount, a commanding interest in its management Company (A) claimed to deduct, in computing its yearly profits for income tax purposes, the payment made to Company (B) under the terms of this agreement The Commissioners found that the payment was made by Company (A) for the purpose of its trade so that it might sell its goods at a better price, and therefore allowed the deduction *Held,* that the question was one of fact rather than of law and that the deduction had rightly been allowed [36]

Per *the Lord President* — ' it all depended on whether this expenditure was really an outlay to earn profit or was in application of profit earned Well that is a question of fact

Per *Lord M'Laren* — ' If the payment made to the affiliated Company could be regarded as charity my opinion would be that it was a payment out of income and that it was subject to income tax But mercantile companies are not in the habit of subsidising competing companies from motive of benevolence Such a payment would not be a legal application of the shareholders money and in the absence of evidence or an admission to the contrary effect I think it is a just legal inference that the payment in question was a payment made for the advancement of the respondents business and with a view to augmenting its capital or its income As this is an annual payment it would as a matter of accounting be regarded as a payment made with a view to the increase of income and would be properly entered in the annual accounts The Commissioners have found in fact that the payment was with a view to earning larger profits ' *ibid*

Per *Lord Pearson* —" But the statute does not require the party claiming the deduction to show that any profit was in fact earned by the expenditure in question It is enough that it shall have been laid out for the purposes of his trade, as this expenditure clearly was But then it must be laid out wholly and exclusively for these purposes and it was argued that the agreement was at least in part, for the benefit of Wilsons Ltd It may have operated to their benefit But we have to do only with Stewarts and Lloyds part of it and even with that not as a definite source of ascertainable profit but as inferring the expenditure of the sum of money here in question for the purposes of their trade I think it clear that from their point of view the expenditure was made for those purposes and for no other ' *ibid*

Lump sums received in commutation of annual charges—Investment of—

A cemetery company received lump sums in commutation of the annual charge for the keep of lairs in perpetuity, and invested such sums as capital *Held,* that such sums are not a

(36) *John Moore v Stewarts and Lloyds Ltd* 6 Tax Cases 501

deduction in arriving at the profits of the company for assessment[37]

Cemetery—Estimated future expenditure—

A commercial and dividend paying Cemetery Company undertook, in consideration of lump sum payments, to maintain in perpetuity the repair of graves and monuments and the decoration of graves in one of its Cemeteries The Company was assessed in respect of its profits under Schedule A (Property), and the Crown contended that, in computing the liability, the lump sum payments of each year should be included in their entirety in the gross receipts of the year, the expenses of the upkeep of the graves for the year being allowed as a deduction *Held*, that in arriving at the profit assessable in respect of the lump sum payments the estimated future expenditure of the Company on the maintenance and repair of the graves and monuments should be deducted[38]

Depletion of capital—No allowance for—

A Cemetery Company sold the use in perpetuity of grave spaces in the Cemetery to be used for burial purposes only *Held*, that a deduction could not be allowed in respect of the estimated cost price of the grave spaces The *ratio decidendi* was the same as in the *Coltness Iron Company Case*,[39] *i e*, that no allowance may be made for the depletion of capital[40]

Ships—Loss of—

A Company who were ship owners and importers of coal insured their ships at half their value and created a reserve fund for the balance A ship valued at £15,000 was lost It was insured for £8,000, and the Company claimed £7,000 as a deduction from profits *Held*, that the loss was one of capital[41]

Ships—Loss of—Partially insured—

A shipping company insured a ship partially with underwriters, and bore the remainder of the risk, itself It set aside a portion of its profits to form an insurance fund, and was not allowed to deduct this portion of profits in computing its liability to tax every year Later on, the ship was lost, and the Company claimed to deduct the amount which it transferred from the Insurance Fund to meet the loss *Held*, that the deduction was inadmissible, the loss being a loss on capital account

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(37) *Paisley Cemetery Company* v *Reith* 4 Tax Cases 1

(38) (*The Paisley Cemetery Company* v *Reith* 4 Tax Cases 1, distinguished *Sun Insurance Office* v *Clark*, 6 Tax Cases 59, followed) *The London Cemetery Company* v *Barnes* 7 Tax Cases 92

(39) 1 Tax Cases 287

(40) *Edinburgh Southern Cemetery Co* v *Kinmont*, 2 Tax Cases 516

(41) *Legg & Sons* v *Inland Revenue*, (1922) Irish, 12 Tax Cases 391

Per *Lord McLaren* —"This is not insurance in the legal sense of the term but only a reservation of the profits . to provide for future losses "[42]

Sinking fund—Payments into—

A Company was empowered by Act of Parliament to raise money upon mortgage for the purpose of carrying out a Government contract, but was required by the same Act to establish a sinking fund for the extinction of the mortgage debt A sum was to be set aside for payment into the sinking fund out of each quarterly payment received under the contract, or out of other moneys belonging to the Company *Held*, following the decision in *Mersey Docks and Harbour Board* v *Lucas*,[43] that the sums thus set aside are not allowable as a deduction in arriving at the Company's assessable profits [44]

Bonus—On repayment of loan—

A Company borrowed money to be employed in its business, and covenanted to pay annual interest thereon, and to repay the capital with the additional bonus of 10 per cent *Held*, that the bonus paid could not be claimed as a deduction in computing the assessable profits of the Company [45]

Investment for securing custom—Loss of—

In order to secure contracts for the erection of mills, it was necessary for an Architect to take up shares of certain Milling Companies granting the contracts The shares taken up were subsequently sold at various dates at a loss The sale of the shares was necessary to provide funds for securing new contracts *Held*, that the loss was a loss of capital, and was not an admissible deduction in arriving at the profits for assessment [46]

Railways—Improvements of road—Replacement by heavier rails—

A railway company is not entitled to deduct from the profits sums expended in improving a section of the line so as to bring it up to the standard of the main line, nor the cost of the extra weight of heavy rails and chairs substituted for lighter ones [47]

Removal—Cost of—

A Company established for the buying and selling of granite moved their business to larger premises, and defrayed

(42) *Thompson* v *The Western Steamship Co Ltd* 44 S L R 71?
(43) 2 Tax Cases 25
(44) *City of Dublin Steam Packet Co* v *O Brien* 6 Tax Cases 101
(45) *Arizona Copper Company* v *Smiles* 3 Tax Cases 149
(46) *Stott* v *Hoddinott* 7 Tax Cases 85
(47) *Highland Railway Co* v *Balderston*, 2 Tax Cases 485

the whole cost of removal out of revenue In calculating their profits the Company claimed a deduction for the expenses of carting granite from the old yard to the new and of taking down and re erecting two cranes *Held* that these items were not allowable deductions

Per *Lord McLaren*— I think that the cost of transferring plant from one set of premises to another more commodious set of premises is not an expense incurred for the year in which the thing is done but for the general interest of the business It is said no doubt that this transference does not add to the capital value of the plant but I think that is not the criterion There are costs that would not properly be set against the income of the year and which yet may not add to the capital value Suppose a person is imprudent enough not to insure his premises or his goods which can be insured and they are burned down and he has to replace the building he could not be allowed to charge the new building against the income of the year although the putting up of it does not add to the value of his property but merely enables it to maintain its original value I agree therefore that the cost of re erecting the cranes and the cartage of materials being a thing not done for the benefit of the one year is not a proper deduction from income [48]

This decision was approved by L C Cave in *British Insulated & Helsby Cables v Atherton* [49]

In order to extend its business a Company opened a manufactory and fitted machinery but subsequently closed it removed a portion of the machinery and re opened the manufactory on a smaller scale and thereby lost a portion of the original expenditure *Held* that this was a loss of capital for which deduction could not be allowed [50]

The moving expenses of a travelling business *e g* a circus or a travelling butcher including the cost of closing up at the old and fitting up at the new place can be deducted from profits but not if the business is a fitting' (as opposed to a travelling) business Accordingly in the case of a firm of meat importers and retailers who owned a very large number of shops and constantly opened new shops and closed old ones with the changing circumstances of their business as a whole it was held that the cost of equipping new shops was capital expenditure [1]

The cost of wholly new fittings in a new place of business is capital expenditure even though the renewal may be compulsory [2]

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(48) *Granite Supply Association v Kitton* 5 Tax Cases 168
(49) 10 Tax Cases 155
(50) *Smith v Westinghouse Brake Co* 2 Tax Cases 357
(1) *Eastmans v Shaw* 14 Tax Cases 218 (H L)
(2) *Hyam v Commissioners of Inland Revenue* 8 A T C 2

Premises—Rebuilding—Cost of—Burnt—Civil commotion—

The assessee, a wine merchant in Dublin, was the lessee of premises which he was bound to keep in proper repair The premises were burnt in a local rebellion He could not recover the loss either from the insurance company or under the Criminal Injuries Act, and had therefore to spend money in re building He had also to spend money in salvaging his books, and in fitting up and adapting temporary premises elsewhere In connection with the levy of Excess Profits Duty it was held that the expenditure in question was capital expenditure, and not an admissible deduction[3] The Privy Council refused leave to appeal in this case

Docks—Ship-building—Deepening of—

The works of a Company carrying on the business of Shipbuilders and Engineers were approached by a channel It was the duty of the Harbour Authorities to keep this channel dredged, but they neglected to do so, and the channel consequently began to silt up As the Harbour Authorities were not in a position to find the funds necessary for the complete restoration of the channel, a cheaper scheme was devised, involving a lesser depth of dredging and the provision of a deep water berth, to which the Company and the Harbour Authorities contributed, the Company's contribution being the greater If this expenditure had not been incurred by the Company, it would have been impossible for them to deliver a battle cruiser which was then in course of completion at their works The Company claimed that this expenditure should be deducted in ascertaining their liability to tax *Held*, that the expenditure was capital expenditure, and was not an allowable deduction in the computation of profits After quoting the following dictum *of the Lord President in Vallambrosa Rubber Company, Ltd* v *Farmer*[4]

"Now I don't say that this consideration is absolutely final or determinative but in a rough way I think it is not a bad contention of what is capital expenditure—as against what is income expenditure—to say that capital expenditure is a thing that is going to be spent once and for all and income expenditure is a thing that is going to recur every year "

Rowlatt, J, said with reference to the above passage

' there is no stress on the words 'every year' The real test is between expenditure which is made to meet a continuous demand for expenditure as opposed to an expenditure which is made once for all to put it shortly

(3) *Martin Fitzgerald v Commissioners of Inland Revenue* 5 A T C 414
(4) 5 Tax Cases 529

Now Mr Tate argued that the expenditure on any work might be revenue expenditure although the result of it endured beyond that year Well I do not know that I differ with that altogether but it seems to me that it must always be a question of fact whether any particular expenditure can be put up against any particular work or whether it is to be regarded as enduring expenditure to serve the business as a whole — *Ounsworth v Vickers Ltd* [5]

This was approved in *British Insulated and Helsby Cables v Atherton* [6] by L C Cave who referred to *Smith v Incorporated Council of Law Reporting*[7] *and Hancock v General Reversionary etc Co* [8] as instances in which payments which did not recur were rightly considered to be income expenditure

Bills—Promotion of—Cost of—

In view of the unsatisfactory facilities given by a Railway Company a firm of coal masters joined with some other traders in promoting two private Bills in Parliament for the construction of a railway line which was intended to give them the necessary facilities and to make them independent of the Railway Company The Bills were ultimately dropped by agreement under which the Railway Company undertook to grant the desired facilities Held (Lord Johnston dissenting) that the expenditure incurred by the firm in the promotion of the two Bills constituted a capital outlay and was inadmissible as a deduction in computing the firm's liability to income tax [9]

This was also approved by L C Cave in the *British Insulated & Helsby Cables* case

Expenditure on investments—What is—

All money laid out by persons who are traders whether it be in the purchase of goods be they traders alone whether it be in the purchase of raw materials be they manufacturers or in the case of money lenders be they pawnbrokers or money lenders whether it be money lent in the course of their trade is used and comes out of capital but it is not an investment in the ordinary sense of the word [10]

A man speculating and building for himself not only a brewery but a couple of hundred houses in order that people who inhabited those houses might deal with the brewery In such a case the money could not be said to be money expended by the brewer upon the business of brewery (*Ibid*)

( ) 6 Tax Cases 6 1
(6) 10 Tax Cases 1[illegible]
(7) 6 Tax Cases 477
(8) [illegible] Tax Cases 3[illegible]8
(9) [illegible] C *Moore & Company v Hare* 6 Tax Cases [illegible]
(10) Per Pollock B in *Re [illegible] Brewery Co v Male* 3 Tax Cases [illegible]

Wagons—Use of—Option purchase—Consideration for—

In order to obtain railway wagons for the conveyance of coal from their collieries to their customers, a Coal Company entered into agreements with a Wagon Company under which a *certain annual sum was paid for a period of years for* a certain number of wagons. By the terms of the agreements, the Coal Company, during the period of the payments, used the wagons at their own risk, and were bound to keep them in repair, and at the end of the period, they had the option of purchasing the wagons at the nominal price of one shilling for each wagon. *Held*, that the annual payments under the agreements were divisible into (*i*) consideration paid for the use of the wagons, and (*ii*) payments for an option at a future date to purchase the wagons, at a nominal price, and that, in so far as the payments represented the consideration for the use of the wagons during the period of agreement, they were admissible as a deduction in the computation of the Coal Company's profits.[11]

Guaranteed interest—Appropriated to sinking fund—

A Company undertook to construct a railway in Brazil under a Government guarantee of 7 per cent. It raised by means of debentures at $5\frac{1}{2}$ per cent, and devoted the 7 per cent to payment of debenture interest, and to the formation of a sinking fund to pay off the debentures. *Held*, that the whole of the sum paid, under the guarantee, during construction, was liable to pay income tax as interest.[12]

Bank overdrafts—Interest on—

A Company, whose main business it was to buy and sell investments, found that owing to the value of their purchases of investments abroad exceeding the amount of their available cash, pledged certain of their securities with their bankers in New York to obtain a fluctuating overdraft, on which interest was charged at current rates from day to day. Subsequently, in addition to the overdraft, the Bank granted the Company a loan (with a fixed maximum) for six months at 6 per cent, which was renewed for a further six months, and then terminated. The Bank collected the interest of the pledged securities, and after charging the interest due to themselves credited or debited the balance to the Company. *Held*, that the interest paid to the bankers in New York was deductible, as an outgoing for the

(11) *Darngavil Coal Company Limited v. Francis*, 7 Tax Cases 1
(12) *Blake v. Imperial Brazilian Railway*, 2 Tax Cases 58

purposes of the business, in computing the liability of the Company for assessment [13]

(The problem is complicated in the United Kingdom because in certain cases Interest on borrowed Capital may not be deducted from taxable profits, the borrower however being entitled to retain the tax when paying interest to the lender, in India the position is simpler, such interest being allowed as a deduction from profits if it is not dependent on the profits)

Employees—Commission—Question of fact—

A father was sole partner, and employed his two sons on salaries *plus* a commission on profits, varying from year to year The commission was raised from 5 to 10 per cent, and then to 33 1|3 per cent, the last, when the father broke down in health, and threw the entire responsibility on the sons Later on, the firm was reconstituted, the father and each of the sons possessing equal shares The Special Commissioners decided that the 33 1|3 per cent commission was not on a commercial basis *Held,* that the amount deductible in respect of the commission, as money wholly and necessarily laid out for business expenditure, was one of *fact* on which the High Court could not interfere [14]

Employees—Boarding expenses—Expenses of going home—

Boarding expenses of servants, and payment to a servant of his expenses incurred in going to his home from the place of employment are not charitable payments but part of the servant's wages, and should therefore be considered to be incurred solely for the purpose of earning profits or gains [15] Expenses in the nature of increment to salaries such as perquisites or free food, etc, in lieu of cash can be treated as trade expenses, but they must have been made without any intention of recovery from the servants and be claimed as deductions in the year in which they are incurred [16]

Loans and gifts to employees—

A loan given to a servant cannot be deducted from the profits if and when it is written off as irrecoverable It is not a trade debt Whether gifts can be deducted or not will depend on the nature of the gifts If they are given as a mere act of charity, they cannot be deducted, but if they are intended to be perquisites for the employees in return for their services, they

(13) *The Scottish North American Trust Limited v Farmer,* 5 Tax Cases 693

(14) *Stott and Ingham v Trehearne,* 9 Tax Cases 69

(15) *Babu Jagannath Tiwari v Commissioner of Income tax, Bihar and Orissa,* 2 I T C 4

(16) *Chittarmal Ramdayal v Commissioner of Income tax,* 3 I T. C 54

can be deducted, even though the employees could not legally claim such gifts [16 a]

Welfare schemes—Expenditure on—

It is one thing to spend money on welfare schemes for employees in order to secure a contented staff that would earn profits for the employer, and quite a different thing to contribute to welfare schemes which happen to cater for employees The difference is clear though somewhat fine *Held* accordingly in a case in which the employer maintained private nursing homes for his staff but also paid subscriptions to a Hospital which also attended to his employees, and paid unusually large subscriptions to the Hospital in certain years, that the subscriptions to the Hospital were not deductible from taxable profits [17]

Employees' wages—Share of profits—

See clause (*iii a*) and notes thereunder The law in the United Kingdom is governed by the following rulings

When employees are remunerated by a share of the profits, in computing the profits of the business, allowance should be made for the work and labour done by people who charge nothing expressly because they have got their share of the profits which is a sufficient inducement to them to do the work See per Rowlatt, J, in *Johnson Bros & Co v Commissioners of Inland Revenue* [18] Bonuses paid to directors at a certain percentage of profits *after* the distribution of dividends to shareholders are not an expense of the business but an appropriation of profits It is in every case a question of what is the real effect of the transaction [19] See also *Stott and Ingham v Trehearne* cited above, in which the Revenue conceded such an allowance, and *Eyres v Finnieston Engineering Company*, infra

In *Commissioners of Inland Revenue v George Thompson & Co*, [20] Rowlatt, J, suggested that while no payment which depended on the assessee's profits as a whole could be deducted from his taxable profits, deductions should be allowed of payments depending on the profits made on individual transactions Thus, if the assessee hired a ship on condition that he would pay a part of the profits of that particular ship, the hire was deductible, but not if it depended on the profits in the assessee's business as a whole The Court also held that hire which represented depre

(16-a) *Uttarmal Tarilal v Commissioner of Income-tax* 3 I T C 54
(17) *Bourne & Hollingsworth v Ogden* 45 T L R [illegible] 14 Tax Cases 349
(18) 1[illegible] Tax Cases 147
(19) *Pegg & Ellam Jones Ltd v C I R*, 12 Tax Cases 82
(20) 9 A. T. C 965

ciation was deductible even if it depended on the ship's earning profits.

In India, before clause (*viii a*) was introduced, a different view has been taken In *R E Mahomed Kassim Routher v Commissioner of Income tax*,[1] the Madras High Court held that no deduction may be made on account of the wages paid to an employee in so far as such wages take the form of a share of profits This decision is practically ineffective now partly because of the subsequent insertion of clause (*viii a*) in this sub section and partly because of the relief from double taxation given by Notification No 8, dated 24 3 28 under section 60

Royalty—Based on profits—

A company, in which half the shares were held by Government, bought crude resin from Government at a price which involved the payment of royalty in the first instance at a certain rate *and also the payment of a further royalty in the following* year, based on the net profits of the company during the previous year The Allahabad High Court held that the second payment of royalty was deductible under section 10 (2) (ix) for the following reasons —(1) The payment was analogous to the payment to a Managing Director of a share of the profits (2) The money was not available for distribution to shareholders (3) The cost of production of resin by the company clearly included the second royalty (4) The second royalty was not part of the consideration for which Government sold the factory to the company but consideration for the resin supplied. (5) The primary object with which Government formed the company was to obtain a market for its resin (6) The charging of a nominal royalty in the first instance and then a further payment was because there were no data on which the royalty *could be fixed*[-]

Partners—Buying out—Payment for—

The assessee had a 36/64th share in the profits of a firm When one of the partners retired in October 1921 and the partnership was dissolved by agreement dated 7th December, it was arranged that he should receive £1,500 "in full satisfaction of his whole share and interest in the profits of the firm" for the year ending 21st December, another £200 on account of outstanding accounts, and sums varying from £500 to £200 for the next five years In the new partnership the assessee had a 2/3rd share The question having arisen how the amounts paid to the retiring

(21) 3 I T C 482

(--) *Indian Turpentine & Resin Co Ltd, Cawnpore v Commissioner of Income tax*, 3 I T C 219

partner should be treated, it was held that they were the price paid to the retiring partner of his retirement, for which the remaining partners were liable irrespective of the existence of profits, and that therefore they could not be treated as the retired partner's share of profits The sums therefore had to be treated as profits of the remaining partners, out of which they discharged capital debts[23]

Competitor—Buying out—Lump sum paid for—

In *Alaganan Chetti* v *Commissioner of Income tax*,[24] the Madras High Court held, following *City of London, etc , Corporation* v *Styles*[25] and *John Smith & Sons* v *Moore*[26] that a lump sum paid to a rival in order to induce him to abstain from competition (bidding for certain contracts) is capital expenditure, and therefore not deductible from the profits

Misappropriation—(By) Managing Director—

The Managing Director of a Company was for many years, up to his death, in sole control of the Company's business An investigation after his death showed that many payments and some receipts not relating to the Company's business but to his private affairs, had been passed through the Company's books, and it was calculated that some £14,000 was due from his estate to the Company The debt was valueless, and was written off as bad in the Company's accounts for the sixteen months to the 30th June, 1920 The General Commissioners, on appeal, allowed the Company's claim to deduct the amount in question in computing its profits for assessment to income tax, holding that the loss was a bad debt that had arisen in the course of the Company's trading *Held,* that there was no evidence to support the Commissioners' findings, that the loss was not a trading loss, and that it was not an admissible deduction from the Company's profits for income tax purposes

Per *Rowlatt, J*—' When the Rule speaks of a bad debt, it means a debt which is a debt that would have come into the balance sheet as a trading debt in the trade that is in question, and that it is bad It does not really mean any bad debt which when it was a good debt, would not have come in to swell the profits What the Commissioners have been misled by, in my judgment quite clearly is this They have allowed themselves to act under the impression that they were taxing the Company on what the Company in a loose way had made and secured In point of law, they were engaged in assessing the profits of the Company's trade, not of the Company itself but of the Company s trade, and I have

(23) *Rutherford* v *Commissioners of Inland Revenue* 1926 Sc L T 394
(24) 3 I T C 44
(25) 2 Tax Cases 239
(26) (1921) 2 A C 13 12 Tax Cases 266

to consider whether there is the least ground for supposing that losses of these sums, resulting in this bad debt, were losses in the trade. I quite think, with Mr Latter, that if you have a business (which for the purposes of to-day at any rate I will assume) in the course of which you have to employ subordinates, and owing to the negligence or the dishonesty of the subordinates, some of the receipts of the business do not find their way into the till, or some of the bills are not collected at all, or something of that sort, that may be an expense connected with and arising out of the trade, in the most complete sense of the word. But here that is not the case at all This gentleman was the Managing Director of the Company, and he was in charge of the whole thing, and all we know is that in the books of the Company, which do exist, it is found that moneys went through the books into his pocket. I do not see that there is any evidence at all that there was a loss in the trade in that respect It simply means that the assets of the Company, moneys which the Company had got and which had got home to the Company, got into the control of the Managing Director of the Company, and he took them out It seems to me that what has happened is that he has made away with receipts of the Company *dehors* the trade altogether in virtue of his position as Managing Director in the office, and being in a position to do exactly what he likes "[27]

Embezzlement—Loss through—

Loss through embezzlement by an employee is not a loss in the nature of capital expenditure but a loss incidental to the conduct of the business, and allowance should be made on this account.[28]

Theft—Loss by—

Whether loss of valuables by theft can be allowed as a deduction depends on whether the loss was incidental to the business If a person receives his profits and is robbed on his way home or after he has placed the profits in his strong room or some other place of safety such a loss is not incidental to business. If, on the other hand, the nature of the business requires the handling of valuables by servants and such servants misappropriated what was entrusted to them or were robbed, the loss would be incidental to the business The proper test to apply is whether in view of the nature of the business there is a reasonable likelihood of the loss in the ordinary course of business. (*S. P. S. Ramaswami Chettiar v Commissioner of Income-tax, Madras.*[28a]) Anantakrishna Iyer, J. dissented and held that all losses due to theft in business premises should be allowed.

(27) *Curtis v J & G Oldfield, Ltd*, 9 Tax Cases 319
(28) *Babu Jagannath Therani v Commissioner of Income tax, Bihar and Orissa*, 2 I. T C 4.
(28-a) 53 Mad 904 59 M L J 403

Director—Overpayment to—

Whether the overpayment of commission to a Managing Director who subsequently became bankrupt and could not repay the advance was a trading loss or a capital loss was considered in *Roebank Printing Co.* v. *Commissioner of Inland Revenue.* It was held that it was a question of fact to be determined by the Commissioners on the evidence before him.[29]

Legal expenses—Reducing capital—

A Company had made losses in trading, and carried forward a debit balance from year to year in its balance-sheet. The existence of this debit balance stood in the way of the payment of dividends when the Company entered on a period of profit earning. To enable dividends to be paid, the Company applied to the Court to have its capital reduced, and for the purpose incurred legal and other expenses. The Company claimed to deduct these expenses in computing the balance of profits and gains for the purposes of assessment to income-tax. *Held,* that the expenditure in question was not expenditure for the purposes of the trade of the Company, but for the purposes of distributing the profits of its trade, and was not a proper deduction in computing the profits for the purposes of assessment to income-tax.[30]

Legal expenses—Mortgage—

The sole proprietor of a business also owned the premises in which it was carried on, but the premises were subject to certain mortgages. One of the mortgagees died and his executors called up the money due. A part was repaid and one of the beneficiaries took over the balance of the bond. The mortgagor incurred legal expenses in connection with the transfer of the bond. *Held, (Lord Salvesen dissenting), distinguishing Usher's case* and following *Strong* v. *Woodifield* and similar cases, that the legal expenses were capital expenditure and not deductible from profits.[31] (Excess Profits Duty Case.)

Legal expenses—Partition—Hindu undivided family—

Expenses incurred in connection with litigation relating to the partition of a Hindu undivided family cannot be allowed as a deduction from the taxable income of the members;[32] nor, evidently, from that of the family.

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(29) 7 A. T C 406· 13 Tax Cases 864.

(30) *Archibald Thompson, Black & Co., Ltd.* v. *Batty,* 7 Tax Cases 158

(31) *Small* v. *Easson,* (1920) Sc. 758: 12 Tax Cases 351.

(32) *Jagmohandas Eastogi* v *Commissioner of Income-tax, Oudh,* 3 I. T. C. 274.

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(32) *Jagmohandas Rastogi v Commissioner of Income tax Oudh,* 3 I T C 274

Damages—

A Brewing Company, which also owned licensed houses, in which they carried on the business of inn-keepers, incurred damages and costs on account of injuries caused to a visitor staying at one of their houses, by the falling in of a chimney. *Held*, that the damages and costs were not allowable as a deduction in computing the Company's profits for income-tax purposes.

Per *the Lord Chancellor.*—" . . . . In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction, for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with it in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation, or fall on the trader in some character other than that of trader. The nature of the trade is to be considered To give an illustration, losses sustained by a railway company in compensating passengers for accident in travelling, might be deducted On the other hand, if a man kept a grocer's shop, for keeping which a house is necessary, and one of the window shutters fell upon and injured a man walking in the street, the loss arising thereby to the grocer ought not to be deducted. Many cases might be put near the line, and no degree of ingenuity can frame a formula so precise and comprehensive as to solve at sight all the cases that may arise. In the present case, I think that the loss sustained by the appellants, was not really incidental to their trade as inn-keepers, and fell upon them in their character not of traders but of householders. . . . ."

Per *Lord Davey*—" . . . It is not enough that the disbursement is made in the course of, arises out of, or is connected with the trade or is made out of the profits of the trade. It must be made for the purpose of earning the profits. . . . . . ."[33]

On the other hand, there is little doubt that damages which really represent the sharing of profits with others, *e.g.*, for the infringement of patents or trade marks are deductible. Such damages would also be undoubtedly taxable in the hands of the recipients. See *Constantinesco* v. *The King* and *Short Bros.* v. *Commissioner of Inland Revenue*, set out under section 3.

Propaganda—Anti-prohibition—By Brewer—

In *Ward & Company* v. *Commissioners of Taxes*,[34] the expenditure incurred by a brewer on an anti-prohibition campaign was disallowed.

Penalties—

Penalties levied for the infringement of customs or any other laws, cannot be allowed as deductions from profits; nor the

(33) *Strong and Company of Romsey, Limited* v. *Woodifield*, 5 Tax Cases 215
(34) (1923) A. C 145

costs incurred in defending proceedings started by the Crown in regard to such penalties [35-36] The point is that the sums in question are not a 'trading loss', and are not spent in order to enable the assessee to 'earn the profits' But the Income tax Act is not necessarily restricted to lawful business only See *Canadian Minister of Finance v Smith* and other cases set out under sections 3 and 4 (3) (*vii*)

Mine—Dead rent—Surplus royalties—

A mine was subject to a minimum dead rent When the royalties exceeded the dead rent, the surplus could be retained until the Company had recouped the amount by which in former years the dead rent had exceeded the royalties *Held,* that the mine was assessable on its full profit without deduction for any surplus royalties retained, although in previous years the dead rent had been paid and assessed when the mine had not begun to work.[37]

(This case arose out of the provisions of the English law under which the royalties are not allowed as deductions from profits but the assessee is authorised to recoup himself by deduction of income tax from the royalty paid)

Letting house—Profits from—

A person assessed in respect of the profits derived from letting her house furnished, claimed to be allowed as a deduction the amount of rent paid by her for another furnished house in which she lived while her own was let *Held,* that the deduction claimed was inadmissible

Per *the Lord President* —"This particular expenditure on a house elsewhere has nothing necessarily to do with the letting of her own house It only represents the necessity of her living somewhere So far as letting her house is concerned, no doubt it is a necessity that she should go out but it is not a necessity of the situation that she should take a house elsewhere She might get put up by friends She might go to a hotel "[38]

Directors—Income from shares—Remuneration—

Under the Articles of Association of a Company the dividends on the shares held by Directors were to be regarded as part of the remuneration of the Directors The shares held by the Directors had been acquired by them for valuable consideration and were held unconditionally *Held,* that the dividends on

(35 36) *Inland Revenue v Warnes & Co*, (1919) 2 K B 444 12 Tax Cases 227, *Inland Revenue v Von Glehn* (1920) 2 K B 553 (C A) 12 Tax Cases 232

(37) *Broughton and Plas Power Coal Company, Ltd v Kirkpatrick*, 2 Tax Cases 69

(38) *Wylie v Eccott*, 6 Tax Cases 128

the shares held by the Directors were not an admissible deduction in computing the profits of the Company

Per *the Lord President*—" . The question really resolves itself into this, whether the right of the (Directors) to receive their dividends was granted to them by way of remuneration for their services The answer is, of course, that it was not "[39]

Tied houses—Repairs of—

A brewer claimed to deduct from his profits the excess of the cost of the repairs of a tied house over the one sixth allowed under Schedule A, i e, in respect of the value of the building *Held*, that the deduction was inadmissible

Per *Smith, L J*—"It is impossible to allege that the whole of this money for repairs of this public house was laid out exclusively for the trade of the brewer it was laid out for many other things too "[40]

But this was overruled—see decisions below

Tied houses—Licences—Cost of unsuccessful applications—

Magistrates licensing public houses required the surrender of licences before granting new licences for new houses, and brewers claimed to deduct sums paid for "call of licences" and other expenses of unsuccessful applications for new licences in arriving at profits for assessment *Held*, that such deductions were not admissible

Per *Phillimore, J*—" (Counsel for the Company) says in fact, they are none of them in respect of successful applications, but are wholly in respect of unsuccessful ones They are not to be supported in respect of successful applications, because they are not part of the annual expenditure of the brewer in the course of the year, they are sums which, either out of capital or out of savings or realised profits he applies in extending his business Why is it not the same thing if he applies those sums in attempts to extend his business, and fails? That money is spent before the licensing day comes round At that moment, after it has been paid and before the licensing day comes round where is it to go? If it succeeds, it is to go into the expenditure of capital, but if it fails it is to go to some other way I want to know, in between where it is to stand it can only stand in between as it will at the end, and if it may not at the end stand as an ordinary deduction from the annual profits, as an annual trade expense, neither can it so stand at the moment when the option is on it it seems to me that *this sum is*, perhaps it is not right in one sense to say, an expenditure of capital in the sense of the original capital of the concern, but it is an expense out of savings or realised profits . "[41]

(39) *Eyres v Finnieston Engineering Company, Ltd*, 7 Tax Cases 74
(40) *Brickwood & Company v Reynolds*, 3 Tax Cases 600
(41) *Southwell v Savill Brothers, Limited*, 4 Tax Cases 430

This decision was approved by L. C. Cave in *British Insulated and Helsby Cables* v. *Atherton.*[42]

Breweries—Tied houses—Compensation Fund Charges—

A Brewery Company were the owners or lessees of a number of licensed premises which they had acquired as part of their business as brewers and as a necessary incident of its profitable exploitation. The licensed premises were let to tenants, who were "tied" to purchase their beer from the Company. Under the Licensing Act, Compensation Fund Charges were levied in respect of the Excise "on" licences held by the tenants, who paid the charges and recouped themselves by deduction from the rents which they paid to the Brewery. It was claimed by the Company that in computing its profits for assessment to income-tax, it should be allowed to deduct the amounts ultimately borne by it in respect of the Compensation Fund Charges. *Held,* in the King's Bench Division that the deduction claimed was inadmissible. This decision was, however, reversed in the Court of Appeal (Kennedy, L. J., dissenting); and the opinions in the House of Lords being equally divided, the judgment of the Court of Appeal was sustained.

Per *Channel, J*—"If a brewer sets up a depot at a distance from his main brewery, for the purpose of increasing his sales, the annual expense of that depot is to my mind clearly an expense deductible as exclusively incurred for the purpose of his business of selling beer . . Then again if in order to sell his beer he has to employ an agent and pay the agent, the payment of that agent is an expense of selling the beer . . . ."

Per *Lord Atkinson*—"Again it is urged that the landlord pays his contribution as landlord, and because of his proprietary interest in the premises, and not as trader, since he would be equally liable to it whether he traded or not That, no doubt, is so, but in the present case the Company have become landlords and thus liable to pay the charge for the purpose solely and exclusively of setting up the tied house system of trading If the Company took under lease a plot of land to enlarge their brewery, or took similarly premises in which to establish a depot to sell their beer through an agent, the same criticism might be applied with equal force to the payment of the rent reserved by the lease They would pay it as lessees, not as brewers They would pay it whether they continued to brew or not Yet under the provisions of the very rule relied upon in this case, they would be entitled to deduct the rent from the profits earned, and that too, utterly irrespective of whether the receiver of the rent used it to pay for his support or for his pleasure, or even to set up a rival brewery

Indeed, even in a contract made for the purchase of material, such as hops or malt, the Company would have to pay for the commodity

(42) 10 Tax Cases 155

supplied not because they are brewers but because they were contracting parties utterly irrespective of whether they carried on their trade or had abandoned it Yet it can hardly be suggested that the price paid for the hops or malt under the contract should not be deducted from the receipts There is therefore in my opinion nothing in this objection

* * * * * * *

Lastly it was objected that the licence, which draws after it the liability to pay the compensation contribution authorises trading in several articles in addition to beer and that the payment of the compensation or any part of it could not be held to be made wholly and exclusively for or in the interest of the trade in beer alone and no doubt as far as the publican is concerned that possibly may be so but as far as the respondents are concerned they deliberately set up wholly and exclusively for the purposes of their trade in beer a system which necessarily subjects them to a liability for the share of the compensation contribution they claim to deduct It matters not to them in respect to what trading in addition to the trading in beer the liability for the entire contribution is incurred They deliberately assume the liability for the landlord s share of it solely to get a market for their beer and therefore the payment of it is a disbursement made wholly and exclusively for the purposes of their trade as vendors of beer '

* * * * * * *

On the other hand,

Per *Lord Shaw of Dunfermline* —" this appears to me to demonstrate that a payment made by an owner irrespective of whether he is in trade or is dealing as a trader with the premises is a payment for the purpose of preserving the owner s rights as such and cannot be said to be exclusively devoted to the purpose of some business in which the owner happens to be engaged In short it seems to be difficult logically to affirm and were it not for the opinion of some of your Lordships and some of their Lordships in the Court below I should deem it impossible to affirm that a payment is exclusively devoted to the purpose of the wholesale brewing trade carried on by the owners of premises when the same payment to the same amount and in respect of the same premises would fall upon the owners although they stopped the brewing business to morrow or although they had never at any time been engaged in any business transactions with the licensee I have as I say difficulty in seeing how an owner s payment can be said to be exclusively for the purpose of a brewer s trade when the payment would fall upon the owner whether he was a brewer or not

While the payment is not in my opinion 'exclusively' for the brewing trade purpose it appears also to be equally clear to me that it is not wholly ' for such a purpose I may point out that even if it were maintained that the payment was to secure the continuing value of a brewery asset still that asset was a value in a licence which was for wine beer and spirits. The payment undoubtedly was for the continuance of that licence as a whole although the trading interest of the appellants with the premises had no reference to anything but beer It

is not difficult to figure cases in which, if an 'on' licence in the full : were reduced to a beer house licence the value of the premises w be greatly reduced while the trade in beer therein with the whol brewer might not be reduced but increased It is to my mind f plain therefore that the payment by the owner who happens to brewer is a payment not exclusively devoted to the purposes of brewing trade but devoted to the purposes of a trade in wine and sp as well as beer and the deduction under the statute cannot accordi apply "[43]

Tied houses—Expenses on—

A Brewery Company were the owners or lessees number of licensed premises which they had acquired solel the course of and for the purpose of their business as brew and as a necessary incident to the more profitable carrying o their business The licensed premises were let to tenants were "tied" to purchase their beer, etc, from the Comp alone The Company claimed that in the computation of t profits for assessment, the following expenses incurred in nection with these 'tied' houses should be allowed —

(*a*) Repairs to tied houses, (*b*) differences between r of leasehold houses or assessment of "property" of freel houses on the one hand and the rents received from the t tenants on the other, (*c*) fire and licence insurance premiu (*d*) rates and taxes, (*e*) legal and other costs

Held, that all the expenses claimed were admissibl being money wholly and exclusively laid out or expended for purpose of the trade of the Brewery Company

Per *Lord Loreburn*—"In my opinion this point was practi decided by the *Lion Brewery Company case*[44] The bre were there allowed to enter upon the debit side an allow which they had to make for their share of the compensation charg respect of their tied houses That compensation levy became payabl them because it was necessary for the levy to be paid in order to the licences which were in the names of their tenants It was held t a proper debit because it was paid to keep going another business success of which was essential to their own That was the principl the decision and not the narrow point that the compensation was pay by statute

' On ordinary principles of commercial trading such loss ar from letting tied' houses at reduced rents is obviously a sound com cial outlay Therefore the item (difference between the rent paid the landlord and the rent recovered from the tenants) mus deducted

(43) *Smith v Lion Brewery Co Ltd* 5 Tax Cases 568
(44) 5 Tax Cases 568

Per *Lord Atkinson*—"I think that that doctrine (*i e*, in the *Lion Brewery case*) amounts to this that where a trader *bona fide* creates in himself or acquires a particular estate or interest in premises wholly and exclusively for the purpose of using that interest to secure a better market for the commodities which is a part of his trade to vend, the money devoted by him to discharge a liability imposed by statute on that estate or interest or upon him as the owner of it, should be taken to have been expended by him wholly and exclusively for the purpose of his trade I use the word 'creates' advisedly in order to meet the case of a trader who lets premises he has, for instance, inherited, to a tenant who covenants to vend his goods in them and buy from him and none other, the goods vended

The trader in such a case, by the letting, creates in himself the estate or interest of a lessor wholly and entirely for the purposes of his trade *viz* to promote a better market for his goods I am bound to say that I cannot see any difference in principle between a liability imposed on such a lessor by statute and a liability imposed on him by the reasonable requirements of his trade

I now turn to the case of *Brickwood & Co* v *Reynolds*[45] The decision is based upon two propositions—that the trade of a publican in a tied house is altogether independent of the trade of the brewer, and therefore the entire expenditure of money on the repairs of the (tied) house could not be held to be expenditure wholly and exclusively for the purposes of the brewer's trade since it was, in addition, expended for the trade of the publican

With infinite respect for the Lord Justice (A L Smith) I think the publican's trade is the vending of the landlord's beer and none other The brewer takes the house, ties it to his brewery and puts the publican into it for the very purpose of having his beer sold through the efforts of this salesman, the tied tenant The two trades are almost, if not altogether, the same enterprise seen from different sides and I confess I am unable to see upon what principle money designedly spent by the brewer with the sole and exclusive object of maintaining the market for his own goods and promoting through the action of this salesman the sale of those goods therein ceases to be an expenditure wholly and exclusively for his (the brewer's) trade because incidentally it may benefit the salesman"[46]

A Brewery Company, in the course of and for the purpose of their business, acquired licensed houses which were let to tenants subject to the usual 'tie' terms The Company claimed that in reckoning their profits as brewers, the following expenses incurred in connection with these 'tied' houses should be allowed —(1) Compensation Levy on tied houses, (2) Premiums paid by the Company for insuring tied houses against fire,

(45) 3 Tax Cases 600
(46) *Usher's Wiltshire Brewery Ltd* v *Bruce*, 6 Tax Cases 399

(3) The difference between the assessment to Income tax, Schedule A, in respect of freehold tied houses or rents of lease hold houses on the one hand, and the rents received from the tied tenants on the other, (4) Replacement of fixtures and fittings of tied houses, (5) Repairs to tied houses Having regard to the findings in the case, Counsel for the Crown consented to an Order reducing the assessment by the amount of the deductions claimed [47]

Advertisements—

"Some trades possibly may be founded very much upon advertisements, and there may be a trade of advertising which is founded upon the value of such advertisements It is a question of degree and I do not at present go the length of saying that in no case can advertisements ever be deducted But there must be a limit to the principle and I do not think that a person who has made a bad bargain and has given a sum utterly disproportioned to the value of the thing as the original premium, is to be entitled to deduct it as an annual expenditure' —Per *Grove, J* in *Gillatt and Watts* v *Colquhoun* [48]

See, however, the dictum of Kelly, C B, in *Watney* v *Musgrave* [49] *Broadly speaking, ordinary advertisements would be allowed as expenses by the Income tax Officer, but special advertisements, e g*, in connection with the increase of capital or reconstructing a company, etc, would not be allowed

Pension—Employees—Commuted value of—

A Company sought to charge as a trade expense a lump sum which it had paid for the purchase, for the benefit of a former actuary and secretary of the Company, of an annuity equal in amount to the pension which had been awarded to him by resolution of the Company *Held*, that the lump sum paid to purchase the annuity was an expense incurred in the business not in the nature of capital expenditure, and was an admissible *expense in computing the Company's profits assessable to* income tax

'In *Watson's case* [50] the Company took over the business of another insurance company and it was a term of the agreement that they should take the manager of that other company into their service at his existing salary with power to commute such annual payment by payment of a certain gross sum They took him into their service but subsequently dismissed him paying him the agreed sum The Court of Appeal held that money so expended not being expended as remuneration for services rendered could not be treated as money expended for purposes of the trade or business The decision was affirmed in the House of

(47) *Youngs Crawshay and Youngs Ltd* v *Brooke*, 6 Tax Cases 393
(48) 2 Tax Cases 76
(49) 1 Tax Cases 2 2
(50) 3 Tax Cases 500

Lords, but on an entirely different ground The ground there was that the bargain between the parties necessarily involved the expenditure, which was part of the consideration for the transfer of the business, "part of the purchase money for the concern" as Lord Halsbury said, and that therefore it was a capital expenditure Having regard to that decision, and to the observations of the learned Law Lords, particularly Lord Shand it is impossible to regard the decision of the Court of Appeal as a binding authority in support of the view that, unless money is expended as remuneration for services rendered in the trading year, it cannot be an expense incurred for the purposes of the trade I do not think that the Court of Appeal intended to lay down such a proposition as of universal application The Court was dealing with the facts of that particular case The contrary principle has frequently been acted on The facts in *Usher's Wiltshire Brewery, Ltd* v *Bruce*[1] are no doubt very different from those in the present Case, but the decision and the grounds on which it was based, appear to me to be inconsistent with any such view In *Smith* v *Incorporated Council of Law Reporting*[2] Lord Justice Scrutton when a judge of first instance, held that the Commissioners were justified in treating a lump sum of £1 500 paid to a gentleman on their Staff of Law Reporting, on his retirement, as an expense incurred in the business carried on, and as such an admissible deduction In *Ounsworth* v *Vickers, Ltd*,[3] Mr Justice Rowlatt, following a judgment of the Lord President in *Vallambrosa Rubber Company* v *Farmer*,[4] said that the proper test to apply is this was the expenditure incurred in order to meet a continuing business demand, in which case it should be treated as an ordinary business expense and an admissible deduction, or was it an expenditure incurred once for all, in which case it should be treated as a capital outlay? I agree with that view, and, applying that test, I think that it necessarily follows, on the facts found by the Commissioners, that the £4,994 should be treated, as the pension was treated as an ordinary business expenditure, and that the deduction should be allowed It is the pension in another form it is actuarially equivalent in value, and it is identical in character It was paid to meet a continuing demand which was itself an ordinary business expense, as the Surveyor had treated it It was no part of the bargain between the two companies that it should be paid as in Watson's case It was paid as the Commissioners state, "entirely as a matter of domestic arrangement" It seems to me as impossible to hold that the fact that a lump sum was paid instead of a recurring series of annual payment alters the character of the expenditure, as it would be to hold that, if an employer were under a voluntary arrangement with his servant to pay the servant a year's salary in advance instead of paying each year's salary as it fell due, he would be making a capital outlay."[5]

(1) 1915 A C 433 6 Tax Cases 399
(2) (1914) 3 K. B 674 6 Tax Cases 477
(3) (1915) 3 K B 267 6 Tax Cases 671
(4) 5 Tax Cases 529
(5) *Hancock* v *General Reversionary and Investment Co, Ltd*, 7 Tax Cases

Pension—Employees—Contribution for—Lump payment—

A Company claimed as a deduction, in computing its profits for income-tax purposes, a lump sum of £50,000 which it had set aside in the hands of trustees as a fund for the relief, out of the income therefrom, of invalidity, etc, amongst its employees. *Held*, that the sum in question was not an admissible deduction in arriving at the Company's profits for assessment to Income-tax. *Hancock* v. *General Reversionary and Investment Co., Ltd.* (*supra*), distinguished.

Per *Pollock, M R*—" it is clear that in order to justify a deduction being made from what I will call the gross profits, it has to be shown—and I think, on this the onus lies upon the subject—that what is sought to be deducted is money wholly and exclusively laid out or expended for the purposes of the trade, that is, for the purpose of earning the profits

Now, that being the rule there are a number of cases which illustrate that (Refers to the *Vallambrosa case*[6] and *Ounsworth v Vickers, Limited*[7]) There are many other illustrations which may be given indicating, that you are not to pay meticulous attention to what has happened in the particular period of charge What you really have to attempt to ascertain is whether or not from the business point of view the expenditure has been wholly and exclusively laid out in the earning of the profits.

Then we come to another class of cases, cases in which an expenditure is made on business grounds of a sum, apparently a capital sum but really to comprise and compress what is an annual charge Where you find that there is a continuous business demand you may on business principles summarise that continuous demand and on prudent grounds you may make a payment which covers more than the particular year, and you may be able to show that that sum has been spent prudently in order to obviate the continuous business demand, and, hence that is a sum wholly and exclusively laid out in the earning of the profits

The case that perhaps illustrates that as well as any is the case of *Hancock*[8] which we have been discussing Upon the facts found Mr Justice Lush determined that in paying down the actual actuarial value of the annuity to which Mr Hancock was entitled, the Company were doing no more than making a payment in order to save themselves the continuous demand which would otherwise fall upon them and that therefore it was a sum wholly and exclusively laid out in the earning of profits, although no doubt the effect was to cover more than the period of charge under the Income tax Act I think that case must be treated as one which depends to some extent upon the actual facts found. It

(6) *Vallambrosa Rubber Co Ltd v Farmer* 5 Tax Cases 529

(7) 6 Tax Cases 671

(8) *Hancock v General Reversionary and Investment Society, Ltd*, 7 Tax Cases 358

might have been possible to deal with it from a different point of view if there had not been the definite and clear facts found as they were

On the other hand and taking the illustration on the other side, it has sometimes been attempted to say that what is really a capital outlay ought to be treated on the same principle, and I can give an illustration of a claim which could be made which could not be allowed Take the case of where a company had certain premises for which they had to pay rent If they expend a certain amount of their capital in the purchase of the freehold of those premises, then the expenditure is not an expenditure to be deducted from their profits as having been wholly and exclusively laid out for that purpose, but it is to be a capital charge and it falls on the other side of the rule, and cannot be treated as a proper deduction That again is illustrated by the actual decision in *Ounsworth v Vickers, Limited*,[9] where it was held that what had been done in that case in securing a better channel and a better berth alongside the premises of the Respondents was capital expenditure, and that the Respondents in that case were not entitled to deduct it from their gross profits for ascertaining their taxable profits

Now I have indicated under the Income tax Statute what is the rule and I have indicated by two illustrations which I have given, what may be taken to be I will not say definitions but illustrations of the sort of cases which fall on the one side or the other And now I come to the present case and I confess that I have found it a difficult one and my mind has fluctuated in the course of the case very considerably The Commissioners have found and it is for them to find the facts that the payments for the maintenance of their work people during invalidity constitute a continuous business demand upon Messrs Rowntree and Company s business having regard to the manner in which that business is conducted So far they have found therefore a fact which justifies Messrs Rowntree in dealing with this matter which is *prima facie* a business demand upon them Then they held that the primary object *of this payment of £50 000 to trustees was to establish a fund* by setting aside a capital sum the income of which would be available to meet this demand and perhaps some emphasis ought to be put upon the fact that they believed that the income would be available I have pointed out that although in certain special circumstances an inroad could be made upon the capital the original intention was that the income alone should first of all be used to meet this continuous demand upon them Then, thirdly the Commissioners found that the actual amounts paid away for invalidity had not been ascertained at the time the payment was made, and were contingent and not capable of ascertainment Now I think that is a very important finding of fact which is binding upon us It cannot be said that the matter then could be dealt with actuarially or that it was a clear business proposition as to whether or not they would continue to pay the sums as and when the demand was made upon them, or whether they would meet that ascertainable and ascertained demand by

(9) 6 Tax Cases 671

an immediate payment as was done in the case of Hancock. In *Hancock's case*[10] Mr Justice Lush said "It seems to me as impossible to hold that the fact that a lump sum was paid instead of a recurring series of annual payments alters the character of the expenditure, as it would be to hold that, if an employer were under a voluntary arrangement with his servant to pay the servant a year's salary in advance instead of paying each year's salary as it fell due, he would be making a capital outlay" In this particular case those attributes cannot be given to this particular payment It is wholly uncertain what claims for invalidity would be made upon Messrs Rowntree No business proposition of the same nature as in Hancock's case would be proposed to them by any insurance office, and the provision they have made may be wise or may not, but it is not a business proposition in the narrower sense that the proposition in Hancock's case was The Commissioners came to the conclusion in applying the law that it was impossible to say that this was invalidity in another form, in the sense in which Mr Justice Lush had described the actuarial payment made in Hancock's case, as a pension in another form I think it more closely approximates to the case of the purchase of a freehold in order no longer to have the demand for rent than it does to a prudent business payment in order to be rid of what was an ascertained demand likely to continue over a series of years

Lord Parker states the principle in the case of *Usher's Wiltshire Brewery, Limited* v *Bruce*[11] He states the principle as to deductions in this way "The better view however appears to be that where a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains it ought to be allowed" Now it seems to me upon the findings of fact before us that it is impossible to determine that this deduction was proper and necessary to be made in order to ascertain the balance of profits and gains It may prove to be good business the payment was certainly dictated by charitable motives and in the best interests of their employees but whether or not it could be said to be proper and necessary is quite another question

On the whole I have come to the conclusion that this payment does not satisfy the Rules, and cannot be said to have been made as wholly and exclusively laid out or expended for the purposes of the trade"[12]

Pension fund—Initial lump contribution—

A company established a Pension Fund—under a trust deed—for its employees to which both the company and the employees subscribed every month In addition, the company paid as a lump contribution to the fund a sum—actuarially determined—to provide pensions for the previous service of the employees It was held by Rowlatt, J, in the King's Bench

(10) *Hancock* v *General Reversionary and Investment Society Ltd* 7 Tax Cases 358 at p 372

(11) 6 Tax Cases 399 at p 429

(12) *Rowntree & Co, Ltd* v *Curtis* 8 Tax Cases 678

Division that the lump sum contribution was an admissible deduction in computing the company's profits *Hancock v General Reversionary and Investment Co*[13] followed, and *Rowntree & Co, Ltd v Curtis (supra)* distinguished[14]

Per *Rowlatt, J*—"It is clear that expenditure which in its nature is a Revenue expenditure does not cease to be deductible because it is not made strictly annually It was conceded that dredging a water passage which is continually silting up is an income expense, and does not cease to be deductible because you may dredge very efficiently in one year and thereby save yourself from having to dredge in the next two years On the other hand I suppose if the (owners) were minded by concreting the bottom of their water passage to make it a channel that never required dredging I apprehend it would not be argued that was income expenditure "

This was however upset by the Court of Appeal which distinguished the case from Hancock's case on the ground that in the latter there was a pre existing liability That is to say, there were two elements in Hancock's case, (1) a pre existing liability, and (2) an actuarial calculation (1) was absent in this case, and (2) was absent in the Rowntree case The Court of Appeal also suggested that if the Commissioners had found as a *fact* that this expenditure on account of the contribution was a necessary expenditure of the business, the expenditure would have been admissible on the analogy of *Usher's Wiltshire Brewery v Bruce*[15] But as a matter of fact the Commissioners merely held the item to be an admissible deduction, *i e*, decided on a point of law on the facts before them

The case went to the House of Lords who by a majority of three to two affirmed the decision of the Court of Appeal

Lord Cave approved of the Hancock case, but thought that in this case a capital asset had been created and that the Hancock case did not apply Lord Atkinson agreed that the expenditure created a capital asset, but did not approve of the Hancock decision Lord Buckmaster offered no opinion as to the correctness of the Hancock decision, and rested his judgment on the ground that the payment was not a proper trading expenses, *i e*, not a proper debit in the Profit and Loss Account Lord Carson approved of the Hancock case, and thought that the case exactly covered the present case also Lord Blanesburgh not only approved of the Hancock case but would have allowed this claim to deduct from profits even if the Hancock case had been decided otherwise

(13) 7 Tax Cases 358
(14) *British Insulated and Helsby Cables v Atherton*, 10 Tax Cases 155
(15) 6 Tax Cases 399

The following extracts are given from the judgments in the House of Lords —

Per *Lord Chancellor* —"But there remains the question whether it is in substance a revenue or a capital expenditure This appears to me to be a question of fact which is proper to be decided by the Commissioners upon the evidence brought before them in each case, but where, as in the present case, there is no express *finding by the* Commissioners upon the point, it must be determined by the Courts upon the materials which are available, and with due regard to the principles which have been laid down in the authorities When an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital For this view there is already considerable authority The object and effect of the payment of this large sum was to enable the Company to establish the Pension Fund and to offer to all its existing and future employees a sure provision for their old age, and so to obtain for the Company the substantial and lasting advantage of being in a position throughout its business life to secure and retain the services of a contented and efficient staff "

Per *Lord Carson* —" Indeed it is under modern views and conditions not only a proper but essential expenditure for carrying on any properly organized business

"It is clear from the terms of the trust deed as already pointed out that in no sense was the sum an investment, that it would be eventually exhausted in payment of the pensions and that in the event of a winding up of the Company it could never form any part of the assets of the Company I cannot, under these circumstances, conceive any system of commercial accountancy under which this sum could ever appear in the capital accounts of the Company Nor is it capital withdrawn from the business as it was admittedly paid out of the earnings of the year It is not disputed that an annual sum contributed to the Pension Fund on an actuarial basis for the purposes of making the Fund solvent for paying the pensions of the older members of the staff would be a proper deduction in arriving at the balance of profits and gains, it would be an ordinary business expense Nor I think can it be disputed that if at any time the Fund threatened to become insolvent after it was started a sum paid to prevent such insolvency would be a proper disbursement in arriving at the balance of profits and gains Why therefore, should the payment of the sum in question which by an actuarial calculation represents the sum equal to the annual payments which would be necessary not be considered as in the same position?

"I notice that my noble friend on the Woolsack agrees with the decision in Hancock's case as I also do, but I fail as Mr Justice Rowlatt

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I notice that my noble friend on the Woolsack agrees with the decision in Hancock's case as I also do [illegible], as Mr Justice Rowlatt

failed to see how it can in principle be distinguished from the present case

Per *Lord Blanesburgh* — The company covenanted to make the following payments (*a*) The sum now in question (*b*) an annual contribution aggregating one half of every sum in the same year contributed by each participant employee (*c*) a contribution sufficient to make the annual return upon the invested moneys of the Fund one of 4 per cent it is I apprehend now well settled that in the Income tax Acts unless the context requires a different meaning to be placed upon them such words as profits gains capital are *to be construed according* to their ordinary signification in commerce or accountancy It will accordingly not be amiss if remembering the nature of the present controversy an attempt be made to ascertain from the statements or accepted implications of the stated case but in the first instance merely as a business proposition what was the precise nature and purpose of the payment now in question and as consequent thereon its proper place in this Company s accounts

I do not myself see how any of these payments could properly be charged to Capital Account by any company which keeps its accounts *on the double account system* And as the Income tax Acts *contemplate* that accounts will be so kept no other system need here be considered Under that system as is well known the two accounts Capital and Revenue or Trading Accounts as in business language it is usually termed are separate accounts The Capital Account is concerned with the Company s fixed capital and its applications The *Revenue Account* is concerned with the Company s trading or circulating capital and its application Dividends may lawfully be paid although it may be the whole of the company s fixed capital has disappeared No profits available for dividend are however existent unless the Company s trading capital would remain intact after they had been *distributed as such* If what I have so far said be correct it follows that for this Company to have charged any of these payments either (*a*) or (*b*), to Capital Account would have thrown on that account a revenue charge would have enabled the Company to ascertain profits and distribute dividends without *taking* it into account would have introduced a *system facilitating in the case* of a company less prosperous the concealment more or less successful of the truth that the dividends declared during a period of depression were in whole or in part being paid out of capital

My Lords on the facts of this case there were as it seems to me only three funds from which any of these payments (*a*) or (*b*) could by such a company as this legitimately have been taken The first was its undistributed profits—the payments if *thence derived being no more* than a series of bonuses to its employees out of the realised profits of good years The second was its gross receipts before profits were struck The third merely another aspect of the second and not applicable to this prosperous Company was working capital to which recourse might properly be had on any *occasion when the gross receipts* after these payments

had been charged against them were less than the outgoings by at least an equivalent amount

"Applied to this Company, on the facts found, there is, as to the first of these, no suggestion of any intention on its part to make these payments out of realised profits The unqualified covenant into which it entered with regard to them would have effectively disposed of such a suggestion, had it been made

'As to the third, the gross receipts as I have indicated, were more than adequate to meet the payments, and still leave a large surplus

"The Revenue Account, therefore, strictly so called, alone remains as the place in which they can properly appear In no sense of the word 'capital', circulating, working or fixed, did this expenditure involve any withdrawal It was made out of gross receipts in a year in which working capital and, *a fortiori*, fixed capital remaining intact, a large surplus still emerged Nor, in my judgment, did the expenditure in any relevant sense create a new asset of the Company of the nature of a fixed capital asset or any other The learned Lord Justice does not more closely describe this so called asset nor, fixed though it was did he attach it to a name by which it could be recognised He did not suggest that it resulted in an enhanced goodwill He could not, in my judgment, have done so with reason, because it has never, I think, even been suggested that a contended personnal is an element in goodwill, whatever else it may be In that state of things it has occurred to me, my Lords that the existence or non existence of this so called asset might fairly be submitted to the prosaic test of asking what in a liquidation, would be forthcoming in respect of it when a liquidator essayed his statutory duty to realise the Company's assets and divide the proceeds amongst his constituents Certainly no part of the Fund That, in its entirety, is completely alienated And I can myself think of nothing else Moreover, my Lords a reference to the authorities shows it seems to me, clearly that it is by reference to no such shadowy conceptions that the words of the statute 'employed as capital' have to be interpreted Such things as a purchase of *goodwill involving a capital expenditure might* come within them *Smith* v *Moore*[16 17] (an Excess Profits Duty case) The expense of making a new channel to the sea essential or convenient for approach to a shipyard would be such expenditure notwithstanding that the channel when constructed would not be the property of the trader and that others jointly with himself would have the right to use it on their lawful occasions[18] The expenses incurred in the promotion of a private Bill the capital object of which was ultimately obtained by agreement[19] These advantages are real and definite I can see nothing comparable here Moreover in this connection also the observation already made is

(16 17) (1921) 2 A C 13 and 3 A T C 369

(18) *Ounsworth* v *Vickers Ltd* (1915) K B 267, 276

(19) *Moore* v *Hare*, 6 Tax Cases 572

true that the principle expounded by the Lord Justice would equally ap *ply to the annual payments to be made by the Company* and admittedly properly chargeable to revenue I think with the Lord Chancellor that the Hancock case was correctly decided, but I should myself have been prepared to decide this case as I do even if I were of opinion that the Hancock case could not be supported—so much more compelling in a relevant respect are the facts and circumstances here '[20]

Employees—Compensation on termination of appointment—

The point as to the deductibility of a payment made upon the *termination of a person's employment* was glanced at in the House of Lords in *Royal Insurance* v *Watson*[21] Lord Herschell reserved his opinion upon it without expressing any view Lord Shand said that he thought damages paid to a dismissed servant—dismissed, I suppose in the interests of the company or the supposed interests of the company, and I also suppose he would include a sum paid by way of agreement to get rid of the claim for damages—might be (and I think it was said with a good deal of force in the argument that that would be) a deductible expense I think that in the ordinary case a payment to get rid of a servant when it is not expedient in the interests of the trade to keep him, would be a deductible expense a person has to employ an efficient staff and also to cease from employing an inefficient staff and if he has to pay for that cessation there is no reason why that should not be an expense incurred for the purposes of the trade He has to facilitate people going when they reach the age of retirement, in their own interests and in the interests of their employer at least he has to deal with the situation and provide in some way as Lord Cave says 'on grounds of commercial expediency' for people who leave his employment "—Per Rowlatt, J in *Noble* v *Mitchell*[22]

Rowlatt, J, also distinguished *Strong* v *Woodifield*[23] on the ground that in that case the expense was only *collateral to the* actual trade, that in any case it was a case near the line, that Lord James of Hereford thought so and that it could not apply to expenses incurred on a staff who earn the profits of the trade

As regards the Revenue nature of the expenditure, the same judge said —

'This gentleman being there as an unsatisfactory servant was not a permanency He was no doubt there for his life but I do not think you can say By the expenditure of capital I will get rid of this nuisance affecting my business and have his room *rather than his company* by making this capital expenditure although the largeness of the

(20) *British Insulated and Helsby Cables, Ltd* v *Atherton*, 10 Tax Cases 155
(21) 3 Tax Cases 803
(22) 11 Tax Cases 372
(23) 5 Tax Cases 215

figures and the peculiar nature of the circumstances perplex one this is simply a payment to get rid of a servant in the course of business and in the year in which the trouble comes '

Rowlatt, J 's judgment was approved on both points by the Court of Appeal, though Lawrence, L J, felt doubts whether the expenditure was not capital

Pensions—Grant of—Business closing down—

A Company which used to grant pensions to its employees on retirement, decided to close down, and when doing so, provided *ex gratia* annuities and compensation for loss of office to the employees *Held*, that the expenditure on the annuities, etc, was not a business expense as it was not required for keeping the trade going nor was it a contractual obligation previously incurred [24]

Miscellaneous business deductions—

While the Act makes no provision for contributions by employers to private provident funds constituted for the benefit of their employees being exempted from the tax (see paragraph 20) contributions to such provident funds *by the employers* should be allowed as a business expense in all cases where the funds are constituted as irrevocable trusts and where the employers contributions cannot be recovered by the employers Where however such funds remain in the hands or under the control of the employers no contributions by the employers can be allowed as a business expense but in such cases actual payments made to employees leaving the service of the employer should be allowed as a business expense in the year in which such payments are made so far as such payments are made from the contributions of the employers whether in that year or in preceding years

The same remarks apply to superannuation funds or reserves for the purposes of providing pensions to *ex* employees Actual sums paid as pensions to *ex* employees or to the widow or children of an *ex*-employee should however be allowed as a business expense where the pensionary payment is a fixed or recurring one but no claims on account of pensions ' *should be entertained where the pensions are paid to persons* who have or who at any time had a share or interest in the business

Premia paid by an employer to cover the risk of liability to compensate any of his employees for injuries under the Workmen s Compensation or Accident Insurance Act (VIII of 1923) should be treated as business expenses and allowed under section 10 (2) (*ix*) as a deduction in assessing income from business

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(24) *Commissioners of Inland Revenue v The Anglo-Brewing Company Ltd*, 12 Tax Cases 803

The following principles should be observed in dealing with claims that *bona fide* expenditure for the welfare of the employees of a business should be allowed as a business expense No contributions towards expenditure incurred by outside bodies which may benefit the employees of a company or firm incidentally with members of the general public should be allowed such as contributions for the support of clubs recreation grounds religious institutions dispensaries hospitals, schools and the like If on the other hand an assessee maintains a school or a dispensary solely for the benefit of his employees reasonable expenditure on the *upkeep* of such an institution should be allowed as a working expense Similarly expenditure incurred in the maintenance of a conservancy staff employed to keep the surroundings of the dwellings of the employees of a concern in a sanitary condition should be allowed In no case however should any capital expenditure be allowed such as for example the amounts expended on the construction of latrines drains water works or hospitals. Sums embezzled by an employee are admissible charge against the business of his employer Assessees sometimes receive from their constituents payments intended to cover Railway expenses cooly charges etc which they have to incur in the course of their business When payments are made out of the sums and are debited specifically to constituents they may be allowed as deductions from the assessable income without insisting on strict proof of payment by the production of vouchers provided that it is reasonably certain that the payments have been made

Sums received not as advances to cover expenses connected with the business but for political religious or charitable purposes should be included in income but the corresponding expenditure on these purposes should not be allowed as a deduction from the taxable income

Audit of an assessee s accounts conducted before his return of income is made where such a return is made on the due date or within any extended period allowed by the Income tax Officer for its submission should be treated as audit conducted for ordinary business purposes and the expenditure incurred on such audit as an admissible deduction in computing taxable income but the cost of audits and similar operations conducted specially for income tax purposes whether in connection with assessments with appeals or with revision petitions cannot be allowed as a deduction from taxable profits [5] (Income tax Manual para 49)

The above instructions in the Income tax Manual regarding Provident Funds are based on a promise given by Government when the Act was passed in 1922 They now apply only to funds which are not 'recognised' under Chapter IX A The latter receive various concessions under the law now See sections 4 (3) (ix), 15 and Chapter IX A From section 58 K it would seem that contributions made by employers to 'recognised' pro

(5) *Ruling of the Madras High Court in Secretary Board of Revenue (Income tax) Madras v B Munisami Chetty & Sons Income tax Manual para 49*

vident funds from year to year are admissible deductions under section 10 (2) (ix) Section 58 K specially lays down that sums initially transferred to the trustees of a recognised provident fund are capital expenditure

In the *Nedungadi Bank* v *Commissioners of Income tax, Madras*,[26] it was held that no deductions were admissible on account of contributions made by the Bank to the provident fund of the employees The case of the Commissioner was that the Bank which credited the accounts of the employees with the contribution still retained some control over the money which it could resume in certain circumstances The liability of the Bank to its employees therefore was not unconditional

In the Burma Corporation case,[26 a] it was held that the employer is entitled to deduct from his profits the contributions made by him to his employees' provident fund when he has parted with the money or lost control over it The fact that, according to the deed of trust of the provident fund and the rules of the fund, it is open to the employer to recover certain amounts in certain eventualities does not affect the above claim to deduction When money is recovered from the fund by the employer, such recovery will go to swell his income

Provident funds—Employee's contributions—United Kingdom Law—

Under section 32 of the Finance Act of 1921, such contributions have been specifically made deductible expenses The funds have to be approved by the Commissioners of Inland Revenue, and the conditions of approval are on similar lines to those set out in paragraph 46 of the Income tax Manual quoted above But the Commissioners are empowered at their discretion to recognise funds even though contributions may be returnable in certain events Moreover the contribution of the employed person is also allowed as a deduction subject to certain limitations Regulations have been framed by the Commissioners (Stat R and O 1921, No 1699) regarding the conditions of approval and the taxation of contributions that are returned

Premia on issue of shares—

The premia received by a company on issue of shares are capital receipts and, as such, not chargeable to tax In the same way the cost of issuing shares is capital expenditure and cannot be allowed as a deduction for income tax purposes (*Income-tax Manual*, para 51)

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(26) (1926) I L R 49 Mad 910 2 I T C 243
(26-a) 4 I T C 49

Trade Associations—Payments to—Evidence—

A Company claimed that levies paid to a Trade Association, of which they were members, should be allowed as a deduction in the computation of their profits The objects of the Association were to raise and keep up prices and thus enable its members to earn larger profits The Company's appeal was heard by the Special Commissioners who required the production of the Association's accounts for the three years forming the basis of the Company's assessment in order to see how the sums received by the Association had been spent The Company did not produce these accounts, alleging that the said accounts were not in their possession or under their control In the absence of this evidence, the Commissioners refused to admit the Company's claim *Held*, that the Commissioners were entitled to require the production of the accounts of the Association, without which the Company's claim could not be properly determined and could not therefore be admitted, and that the case be remitted to the Commissioners to consider the same with such evidence as might be obtained from the accounts [27]

A similar course was adopted also in *Adam Steamship Co v Matheson* [28] In that case, the Company not only pleaded inability to produce the evidence, but contended that it was irrelevant as the subscription paid by them was really for insuring the Company's ships The argument of the Crown was *that* the Association had other objects than the mere insurance of ships belonging to its members, and that it was necessary for the Commisioners to be satisfied that the subscriptions paid to the Association were spent on objects the expenditure on which would have been allowed as a deduction if spent directly by the individual member

Trade Associations—Payments to—Conciliation Board—Mining Association—Experiments—

A Company who were members of a Coalowners' Association, claimed to deduct certain contributions representing levies made by the Association and expended (1) in defraying expenses of the Conciliation Board in Scotland, (2) in paying subscriptions to the Mining Association of Great Britain, and (3) in experimenting with coal dust *Held*, that, so far as applied in defraying the expenses of the Conciliation Board, the levies were an admissible deduction in arriving at the liability of the Company, but that,

(27) *Grahamston Iron Company v Crawford*, 7 Tax Cases 25

(28) 12 Tax Cases 399

so far as applied to the other two purposes, they were not admissible

Per *the Lord President* —"The Conciliation Board is a machinery by which disputes between the workmen and the employer may be settled, and by that means expenses kept down and more profits earned, and although of course there may not be in any one particular year work for the Conciliation Board to do it was a machinery which the Coalowners were entitled to keep, just as one might as proper expenses have a legal Secretary, although fortunate in having no law expenses or litigation in a particular year The next item is subscription to the Mining Association That I think is an expense that cannot be deducted, because the Mining Association is an Association of a particular definite character, to keep a watchful eye on the proceedings no doubt in the interest of mining interests generally but without that character of particular service which I think is prominent in a Conciliation Board Last of all there comes £59 which was expended in experiments in coal dust It is explained that the experiments were made on the explosive properties of coal dust at the instigation of the Home Secretary who wished certain experiments made before embarking on new legislation It was a voluntary and very proper act of the Company to help him in the matter, but not an expense they undertook for the purpose of earning more profits than of any other year—just a helping hand to the legislature of the country It was paid out of profits and not with a view to earning profits ' [29]

Trade Associations—Workmen's Compensation—Indemnity—Premia paid—

The assessee Company, who were colliery owners, were members of an Association which consisted of coalowners, and the object of which was to indemnify the members against claims under the Workmen's Compensation Act The Association consisted of twenty members It made calls on members based on the amount of wages paid by them, and also had a reserve fund The risks were partly reinsured Members could retire from the Association after giving six months' notice, and a member who retired was entitled to his proportion of the reserve fund minus his proportion of the expenses and liabilities of the Association, up to the date of his retirement The question arose whether the amounts paid by the assessee Company to the Association could be deducted from the assessable profits of the Company, having regard to the fact that a part of the money was eventually returnable to the Company *Held*, that the expenditure was an admissible deduction [30]

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(29) *Lochgelly Iron and Coal Co, Ltd v Crawford*, 6 Tax Cases 267

(30) *Thomas v Richard Evans & Co*, 11 Tax Cases 790 (H of L.)

Trade Associations—Strikes—Indemnity against—

A Colliery Company were members of a Coalowners' Association to which they paid a subscription based on their output of coal The object of the Association was to pay its members an indemnity in the event of deficiency or stoppage of output being caused by strikes etc *Held* that the subscription was not money laid out for the purposes of the trade, and was therefore not admissible as a deduction in arriving at the profits assessable [31]

Trade Associations—Keeping up prices—

The assessee Company was a member of the Steel Hoop Manufacturers Association, which was mainly formed for the purpose of keeping up prices Under the rules and pooling arrangements of the Association the members were entitled of coal The object of the Association was to pay its members invoicing more than his proportion of orders had to pay 10*s* per ton on the excess to the Pool Account which was distributed among those members who had invoiced less than their proportions *Held* that the net payments made by the Company to the Association in excess of those received from the Association by the Company were an admissible deduction for the purpose of arriving at the Company s assessable profits

Per *Bray J* — The trade includes not only the manufacture but the selling and indeed the selling is very often the most important part the whole of the profits depends upon the price What does the selling consist of? It consists of two things the finding of the customer and making a bargain with the customer as to the price the object being of course to get the highest possible price I do not think this arrangement that is made between the three firms has anything to do with finding the customer I think it all relates to the fixing of the price and it is obvious that if the appellants can make an arrangement with their competitors that their competitors will not sell below a certain price they will be able or may be able at all events to get that price or a higher price for their goods That is part of the business part of the trade they are carrying on to get the highest price they can for their goods [32]

Trade Association—Goods purchased from—Cost of—

A Trade Association purchased on behalf of its members certain goods which it sold to them at a profit The 'profit' was held at the credit of the common fund of the Association The question arose in assessing one of the member companies whether the full cost of the goods purchased by it from the Association

(31) *Rhymney Iron Company Ltd.* v *Fowler* 3 Tax Cases 4 6

(32) *Guest Keen and Nettlefolds Ltd.* v *Fowler* 5 Tax Cases 511

should be debited in its accounts or only the nett cost after deducting the Company's share of profit in the Association *Held*, that inasmuch as the profit retained by the Association in the common fund could not be considered to belong to individual members until actually distributed the *full* cost of the goods should be debited in the member company's accounts[33]

Losses on 'future contracts"—Reserve in final accounting period—Inadmissible deduction—

The prices at which the assessees had *entered into contracts* to purchase esparto and pulp had proved to be much higher than the prices ruling in the market at the end of the accounting period in question The assessees wanted to provide for the losses involved in the fall in prices, and accordingly placed to reserve a part of the profits earned during the accounting period *Held*, that they could not deduct the amount so taken to reserve in computing their profits

Per *the Lord President* (*Clyde*) — It is a general principle in *the computation of the annual profits of a trade or business under the* Income tax Acts, that those elements of profit or gain and those only, enter into the computation which are earned or ascertained in the year to which the inquiry refers and in like manner only those elements of loss or expense enter into the computation which are suffered or incurred *during that year* *It is a common place that subject* always to the observance of the rules and general principles of the Income tax Acts no particular method of computing profits is a part of the law universal The appellants drew our attention to a recent decision in the House of Lords[34] It seems obvious that the character and *position of a fire insurance business—depending as it does on the chapter* of accidents and involving payment of the annual premiums in advance —are different from the character and position of an ordinary commercial business '[34-a]

Hiring ships—Charter parties—Time charters—Provision for future losses—Deduction of—Inadmissible—

A Company whose business consisted of hiring on time *charters and carrying goods and merchandise as they offered, and* whose charters extended beyond the accounting period, claimed to debit the account with the rates payable for the unexpired portion of the charters and credit *per contra* with the probable rate for hire for new charters in the next year That is, in view of probable reduction in freights, the company attempted to write down the future losses *Held*, that such writing down was not admissible.

(33) *Charles Clifford & Son v Puttick* 14 Tax Cases 159

(34) *Sun Insurance Office v Clark* 6 Tax Cases 59

(34-a) *Collins & Sons v Commissioners of Inland Revenue* 12 Tax Cases 773

Per *the Lord President* (*Clyde*) —"They (appellants) figured the time charters as being part of the trading capital of the company But it is not really possible to regard the time charters as stock in trade, for in point of fact the company never dealt with them as such They did not deal in time charters and neither bought nor sold them All they did was to hire the services of a ship at so much a month for so many months and use them for a profit much as a man might hire omnibuses and horses or motor conveyances and either himself employ them in carrying passengers at a profit or sub let them to others. In all such cases the periodical payment of hire is just one of the incidents inevitable to the making of profits "[35]

Forward contracts—Expected losses—

A firm of muslin manufacturers bought yarn from the spinners on forward contracts The price of the undelivered yarn to be delivered after the close of the accounting period was £9,000, but owing to fall in prices its value would not be more than £3,000 The firm accordingly arranged that the difference of £6,000 should be treated as a debt due to the spinners, and that the undelivered yarn should be subject to a new contract at the prices prevailing *Held* that the £6,000 could not be deducted from the profits

Per *the Lord President* —' Anticipated loss in a future year or period—however inevitable it may be thought to be—is not, and cannot be a loss on the trading of the present year upon which it has not in fact fallen If the appellants had found themselves unable to complete the forward contracts and had had to pay a sum of damages to the spinners in order to get quit of their obligations under them the case might possibly have been different "[36]

See also notes under section 13 as to how far future losses can be included

Fees—Accountants and Lawyers—Income-tax cases—Inadmissible—

Moneys spent in engaging Accountants and Lawyers for representing a case before the Income tax authorities are not spent for earning the profits and are not an admissible deduction[37]

It follows from the above that the expenditure on a reference to the High Court is also not an admissible deduction

Surety—Loss from standing as—

The loss incurred by standing as surety in a matter unconnected with the business of the assessee is not deductible[38]

(35) *Whimster & Co v Commissioners of Inland Revenue,* 12 Tax Cases 813
(36) *J H Young & Co v Commissioners of Inland Revenue* 12 Tax Cases 827
(37) *Board of Revenue v Munisami Chetti* 1 I T C 227
(38) In re *Ishardas Daramchand,* 2 I T C 12

It does not follow from this that if the surety was given in connection with the business it would have been allowed That would have depended on whether the expenditure was of a capital nature and also whether it was incurred solely for the purpose of earning the profits of the business

The assessees, a firm of three partners, had a 9|16ths share in M & Co, a firm who were Secretaries, Treasurers and Agents of certain companies running cotton mills In June, 1920, certain Mills which belonged to M & Co were sold to a company in return for fully paid up shares allotted to them The firm continued to be Secretaries and Agents of the company One L agreed to buy 750 ordinary shares from the firm, and to enable him to pay for the shares, the assessees who were also partners in the firm who were managing agents of an Industrial Bank, obtained an advance of Rs 2,43,750 from the Bank by M & Co giving verbal guarantee L became insolvent and the Bank recovered the money from M & Co and handed back the shares Assessees paid to M & Co 9|16ths of the money recovered by the Bank and received 422 shares The assessee claimed to set off under section 24 (1) the difference between this 9|16ths (Rs 1,38,231) and the market value of the shares as a trading loss against their other profits

Held, that the loss was merely a capital loss arising out of M & Co trying to sell their shares, and that it did not arise out of trading since standing surety was not part of the business [39]

Duplicand—Feu duty—

A Company was assessed to income tax in respect of profits which it derived from carrying on business as proprietors of a school The properties in which the school was carried on were owned by the Company, and consisted *inter alia* of playing fields which, together with other lands by the Company, were subject to an annual feu duty payable to the superiors of the ground The feu charter provided that, in addition to the annual feu duty, a duplicand of feu duty over the ground was payable by the Company at intervals of twenty one years The Company claimed to deduct as a trading expense a payment representing the duplicand which under the terms of the feu charter it had made to the ground superiors *Held*, that the payment of the duplicand was made by the Company as a condition of the ownership of land, and not as an expense of carrying on its business,

(39) *Girdhardas Harivallabhdas v Commissioner of Income tax* 3 I T C 83

Rule 31 The income, profits and gains of companies carrying on Dividing Society or Assessment business shall be taken at 15 per cent of the premium income in the previous year and, in the case of non resident companies, at 15 per cent. of the Indian premium income in the previous year

Rule 32 Notwithstanding anything contained in rules 25 to 31 the total income, however, of an insurance company carrying on more than one class of business shall be determined by its aggregate income from all classes of businesses.

Rule 35 The total income of the Indian branches of non resident insurance companies (Life, Marine, Fire, Accident, Burglary Fidelity Guarantee, etc), in the absence of more reliable data may be deemed to be the proportion of the total income profits or gains, of the companies, corresponding to the proportion which their Indian premium income bears to their total premium income

See also notes under section 59 (3) which was inserted by Act XXVIII of 1927

Scope of rules above—

Under these rules the income profits and gains of *life* assurance companies incorporated in British India are determined by taking the annual average of the total profits disclosed by the last actuarial valuation adding thereto any deductions made from the gross income in arriving at the actuarial valuation which are not admissible under the Income tax Act and adding also any Indian income tax deducted from or paid on income derived from investments before such income is received If the *Indian income tax* deducted at the source from interest on investments exceeds the tax on profits thus calculated, a refund is permitted of the amount by which the deduction from interest on investments exceeds the tax payable on profits The same provisions under rule 26 apply also to the determination of the income profits and gains derived from the *annuity and capital redemption* business of life assurance companies the profits of which can be ascertained from the results of an actuarial valuation

For the purpose of refund in such cases it is the annual average of the tax deducted from the interest on the company's investments at the source that is to be taken and not as has been sometimes claimed by insurance companies the tax actually paid during a particular year of assessment The reason for this is obvious. The method of assessment based on the previous valuation is itself a concession which if the companies wish to enjoy they must take as a whole If there were to be a subsequent readjustment with reference to any of the transactions in the current actuarial period, this would have to be made after the period was closed with reference to the transactions of the company as a whole

during that period, but this course would obviously not be suitable as it would mean very long deferred adjustments

In *other classes* of insurance business (fire, marine, motor car, burglary, etc), an annual calculation of profits is practicable, and rule 29 provides, in the case of those particular businesses for the method of treating sums placed by companies carrying on some or all of these branches of insurance business to reserves for unexpired risks The reasons underlying the concession granted in this rule should be carefully noted The profits derived for instance by a Fire Insurance Company from the premia which it receives cannot be finally determined until the policies issued in return for the premia have expired and the risks to the company thereunder have terminated and, as the periods during which the risks endure will not ordinarily coincide with the period on which the assessment to income tax is based, it is necessary to frame some estimate of the expenditure which the company will be called upon to incur owing to the fact that the risks covered by its premium income in the year of assessment have not entirely ceased With proper safeguards to prevent manipulation of the accounts, this estimate can equitably be made by treating sums placed by insurance companies carrying on these classes of business to their reserves for unexpired risks as expenditure incurred solely for the purpose of earning the profits of the business And where, as not infrequently occurs the reserve is divided into two parts of which the first is intended to cover normal unexpired risks and is generally reckoned at a fixed percentage of the premiums and the second is intended to cover exceptional losses from widespread calamities, the rule allows this treatment to additions to both parts of the reserve The safeguards against abuse, which the rule imposes are as follows —

(1) All sums on account of unexpired risks, which a company wishes *to have treated as expenditure for income tax or super tax* purposes, must actually be credited to a Fund in the accounts of the Company,

(2) They must also be specifically appropriated to meet liabilities under existing contracts, and

(3) The contracts must be with policy holders

The only other fund established by insurance companies for which special provision is made in the rules (Rule 30) is the Investment Reserve Fund Amounts actually credited by an insurance company of any kind, in the ordinary accounts of its business for the accounting period to its Investment Reserve Fund for the purpose of meeting depreciation in the value of its securities, can be treated as expenditure incurred for the purpose of earning the profits of the business in determining the taxable income of the insurance company in that year. The reasons for this departure from the general rule that reserves are not allowed as a business expense are as follows —In t[illegible] rst place it may be noted that these adjustments are not optional, t[illegible] any is required to make them in order to [illegible] that its assets [illegible] verstated in the valuation The [illegible]ansfer [illegible] by a Life A[illegible] ompany to Investment Reserve [illegible]nd d[illegible] ver, essentia[illegible] placin[illegible] nounts to reserve

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(39) *Girdhardas Harivallabhdas v Commissioner of Income tax,* 3 I T C S

and that the payment in question was therefore not admissible as a deduction in arriving at the profits of the Company for the purpose of assessment under Case I of Schedule D [40]

Agent—Railway expenses—Cooly charges, etc —

If an assessee receives from his constituents specific sums definitely meant to cover Railway expenses, cooly charges, etc, to be incurred on behalf of the constituent, such sums are not income of the assessee If such sums are not actually disbursed as expenditure, but the assessee makes a profit on them, the receipts should obviously be taken as income and the outgo deducted as expenditure necessary for the business

Charities—Payments to—

"It is a well known and long-established custom for Indian traders and business-men generally in all parts of the country to charge their customers or clients a small fee on each transaction—for example, so many pies on each bag of some commodity sold—the proceeds of which are supposed to be devoted to various religious, charitable or educational purposes and, it is believed, are generally so applied ultimately

2 The legal position in regard to such receipts and expenditure is often very doubtful but considerable discontent has been caused by the disallowance of deductions claimed by income tax assessees on account of expenditure of this class

3 The Central Board of Revenue has now decided that in future *customary* subscriptions by clients and customers for religious or charitable (including educational) purposes, and the corresponding expenditure by the assessee, shall be left out of account altogether in computing the taxable income, *provided that the Income tax Officer* is reasonably satisfied that the sums in question are really applied by the assessee ultimately (and not necessarily in the year of collection) to the object for which they were ostensibly collected

4 It has also directed that such subscriptions should not be separated from the business expenses of the subscriber and disallowed in assessing him" (*Press Communique,* dated the 25th February, 1928)

Life Assurance Companies—

The following rules have been framed in respect of Life Assurance Companies —

Rule 25 In the case of Life Assurance Companies incorporated in British India, whose profits are periodically ascertained by actuarial valuation, the income, profits and gains of the Life Assurance business shall be the average annual net profits disclosed by the last preceding valuation, provided that

(40) *John Dow v Merchiston Castle School* 8 Tax Cases 149

any deductions made from the gross income in arriving at the actuarial valuation which are not admissible for the purpose of income tax assessment, and any Indian income tax deducted from or paid on income derived from investments before such income is received, shall be added to the net profits disclosed by the valuation

Rule 26 Rule 25 shall apply also to the determination of the income, profits and gains derived from the annuity and capital redemption business of life assurance companies, the profits of which can be ascertained from the results of an actuarial valuation

Rule 27 If the Indian income-tax deducted from interest on the investments of a company exceeds the tax on the income, profits and gains thus calculated, a refund may be permitted of the amount by which the deduction from interest on investments exceeds the tax payable on such income, profits and gains

Rule 28 In the case of other classes of insurance business (fire, marine, motor car, burglary, etc) of a company incorporated in British India, the income, profits or gains shall be determined in accordance with the provisions of the Act, subject to the allowance specified in the rule next following

Rule 29 If, in the ordinary accounts of any insurance business other than Life Assurance, Annuity, or Capital Redemption Business carried on by an insurance company, any amount is actually charged against the receipts, for the sole purpose of forming a reserve to meet outstanding liabilities or unexpired risk in respect of policies which have been issued (including risk of exceptional losses), and is not used for any other purpose, such amount may be treated as expenditure incurred solely for the purpose of earning the profits of the business

Rule 30 Any amount either written off in the accounts or through the Actuarial Valuation Balance sheet to meet depreciation of, or loss on, securities or other assets, or which is carried to a reserve fund formed for that sole purpose and not used for any other purposes, may be treated as expenditure incurred solely for the purpose of earning the profits of the business Any sums taken credit for in the accounts or Actuarial Valuation Balance sheet on account of appreciation of, or gains on, the securities or other assets shall be deemed to be income chargeable to tax, subject always to deduction of such portion thereof as has been otherwise taken into account in calculating the income, profits or gains

Rule 31 The *income, profits and gains* of companies carrying on Dividing Society or Assessment business shall be taken at 15 per cent of the premium income in the previous year and, in the case of non resident companies, at 15 per cent of the Indian *premium income* in the previous year

Rule 32 Notwithstanding anything contained in rules 25 to 31, the total income, however, of an insurance company carrying on more than one class of business shall be determined by its aggregate income from all classes of businesses

Rule 35 The total income of the Indian branches of non resident insurance companies (Life, Marine, Fire, Accident, Burglary, Fidelity Guarantee, etc), in the absence of more reliable data, may be deemed to be the proportion of the total income, profits or gains, of the companies, corresponding to the proportion which their Indian premium income bears to their total premium income

See also notes under section 59 (3) which was inserted by Act XXVIII of 1927

Scope of rules above—

Under these rules the income profits and gains of *life* insurance companies incorporated in British India are determined by taking the annual average of the total profits disclosed by the last actuarial valuation adding thereto any deductions made from the gross income in arriving at the actuarial valuation which are not admissible under the Income tax Act and adding also any Indian income tax deducted from or paid on income derived from investments before such income is received If the *Indian income tax* deducted at the source from interest on investments exceeds the tax on profits thus calculated, a refund is permitted of the amount by which the deduction from interest on investments exceeds the tax payable on profits The same provisions under rule 26 apply also to the determination of the income, profits and gains derived from the *annuity and capital redemption* business of life assurance companies, the profits of which can be ascertained from the results of an actuarial valuation

For the purpose of refund in such cases, it is the annual average of the tax deducted from the interest on the company's investments at the source that is to be taken, and not, as has been sometimes claimed by insurance companies the tax actually paid during a particular year of assessment The reason for this is obvious The method of assessment based on the previous valuation is itself a concession which, if the companies wish to enjoy, they must take as a whole If there were to be a subsequent readjustment with reference to any of the transactions in the current actuarial period, this would have to be made after the period was closed with reference to the transactions of the company as a whole

during that period but this course would obviously not be suitable as it would mean very long deferred adjustments

In *other classes* of insurance business (fire, marine motor car burglary etc) an annual calculation of profits is practicable and rule 29 provides in the case of those particular businesses for the method of treating sums placed by companies carrying on some or all of these branches of insurance business to reserves for unexpired risks The reasons underlying the concession granted in this rule should be carefully noted The profits derived for instance by a Fire Insurance Company *from the premia which it receives cannot be finally determined until the* policies issued in return for the premia have expired and the risks to the company thereunder have terminated and as the periods during which the risks endure will not ordinarily coincide with the period on which the assessment to income tax is based it is necessary to frame some estimate of the expenditure which the company will be called upon to incur owing to the fact that the risks covered by its premium income in the year of assessment have not entirely ceased With proper safe guards to prevent manipulation of the accounts this estimate can equitably *be made by treating sums placed by insurance companies carrying on* these classes of business to their reserves for unexpired risks as expenditure incurred solely for the purpose of earning the profits of the business And where as not infrequently occurs the reserve is divided into two parts of which the first is intended to cover normal unexpired risks and is generally reckoned at a fixed percentage of the premiums and the second is intended to cover exceptional losses from widespread calamities the rule allows this treatment to additions to both parts of the reserve The safeguards against abuse which the rule imposes are as follows —

(1) All sums on account of unexpired risks which a company wishes to have treated as expenditure for income tax or super tax purposes must actually be credited to a Fund in the accounts of the Company

(2) They must also be specifically appropriated to meet liabilities under existing contracts and

(3) The contracts must be with policy holders

The only other fund established by insurance companies for which special provision is made in the rules (Rule 30) is the Investment Reserve Fund Amounts actually credited by an insurance company of any kind in the ordinary accounts of its business for the accounting period to its Investment Reserve Fund for the purpose of meeting depreciation in the value of its securities can be treated as expenditure incurred for the *purpose of earning the profits of the business in determining the taxable* income of the insurance company in that year The reasons for this departure from the general rule that reserves are not allowed as a business expense are as follows —In the first place it may be noted that these adjustments are not optional the company is required to make them in order to ensure that its assets are not overstated in the valuation The transfer of sums by a Life Assurance Company to Investment Reserve Fund differs moreover essentially from the placing of amounts to reserve

by a bank or an ordinary commercial company either for the purpose of extending its business or for the provision of additional working capital the sums thus placed to reserve are practically speaking, composed of undistributed profits There is also a substantial difference between this transaction on the part of an insurance company and that by which a bank writes off the depreciation of the securities which it holds A bank meets depreciation by reducing its Reserve Funds a Life Insurance Company meets it by reducing its Life Assurance Funds and this reduction may be made either by writing down its assets or by leaving the assets unaltered and setting up as a liability an Invesment Reserve Fund equal to the depreciation The latter course is usually adopted but in both cases the depreciation is a loss and to tax the amount of depreciation would lead to the anomalous result that the greater the loss to the company the greater would be the amount which it is required to place to its Investment Reserve Fund and consequently the greater the tax it would have to pay

On the other hand should the accounts show a credit for appreciation of assets rule 30 provides for such appreciation being taxed The words as has been otherwise taken into account in the latter portion of rule 30 mean 'having been carried to the life assurance fund or otherwise taken into account

The reason for the use of the word 'may' instead of shall in rules 27 29 and 30 is that while the concessions conferred by these rules should be granted as a general practice the income tax authorities retain a discretion to refuse them where the concessions have been abused

Companies carrying on *Dividing Society or Assessment* business are in a different position to the insurance companies proper in that they have not to build up funds similar to the Life Assurance Fund of ordinary Life Assurance business and their profits are not ordinarily ascertainable by actuarial valuation It is necessary therefore to fix some arbitrary method of determining the taxable income of companies transacting these kinds of business and under rule 31 this is done by taking 15 per cent of the premium income in the 'previous year (*Income tax Manual* para 107)

"Indian'—

In the above group of rules, the word "Indian" appears to have been used rather loosely for "British Indian" Contrast Rule 33 in which "British India" is referred to

Life Insurance Companies—Taxation of—In the United Kingdom—

The position regarding bonuses given to policy holders was considered in *Last v London Assurance Corporation*,[41] the leading case on the subject The London Assurance Corporation was a Proprietary life office in which a proportion of the life "profits" was allocated to the participating policy holders The following questions arose, viz (1) whether the bonuses in

(41) 2 Tax Cases 100

question were 'profits' at all, i e, whether it was not a case of setting aside a necessary expense of making the income, (2) whether the whole expenses were deductible from the profits, (3) how the life 'profits' were to be determined, and (4) whether the business should be assessed as a whole, i e, including participating and non participating policies The Commissioners held (1) that the bonuses were not 'profits', (2) that the whole expenses should be deducted, (3) that the 'profits' should be ascertained 'actuarially' (the law in the United Kingdom did not contain any special rules for the ascertainment of 'profits' of Life Assurance Companies as the law in India now does), and (4) that the business should be assessed as a whole and *not* in parts The case which eventually went up to the House of Lords elicited considerable difference of opinion, and was finally decided in favour of the Crown, the bonuses being considered to be 'profits', i e, the grant of bonuses being considered to be appropriation of profits and not a necessary expenditure for earning the profits

This decision was followed in *Equitable Life Assurance Society of United States* v *Bishop*[42]

The London Assurance case was the subject of discussion again when the *New York Life case*[43] (cited under section 3) was decided In this case, again, which went to the House of Lords, there was a sharp difference of opinion as to whether the case was distinguishable at all from the London Assurance case The majority in the House of Lords distinguished the case, and in doing so, reaffirmed the London Assurance decision The point of the distinction was that the New York company was 'mutual' whereas the London one was proprietary

The London Assurance decision, however, was not of much practical consequence to Insurance Companies in the United Kingdom As under the United Kingdom law the Crown has the option to tax either the interest on investments (less expenses of management) or the profits at its option—and in this respect Insurance Companies stand in the same position as other businesses—the decision did not place the Crown at any real advantage except in respect of what are known as "Industrial" companies In ordinary Life Insurance Companies the 'profits', i e, actuarially determined, are not except during the infancy of the companies likely to be greater than the interest on investments On the other hand, in Insurance Companies operating amongst the poorer classes, the cost of collection and

(42) 4 Tax Cases 147
(43) 2 Tax Cases 460

management is quite heavy—it is often greater than the interest on the investments, and it is the 'profits' of the business that are taxed On the recommendation of the Royal Commission of 1920, the law was altered in 1923 in order to assist these 'Industrial' companies, and bonuses allocated to policy holders are now deducted from the profits in the United Kingdom The new arrangement does not in practice, of course, affect the majority of the regular Insurance Companies, i e, those not doing 'Industrial' business

The law in India is clear Rules 25 to 32 and 35 leave no doubt as to the position here What is taxed in India is the net actuarial profits without deducting the bonuses

It should be mentioned however that the taxing of actuarial profits is not really so equitable a method of taxation as it might seem at first sight, not even as equitable as the admitted by crude United Kingdom law which taxes the interest on investments less expenses of management The present position in India is somewhat like permitting a trader to value his assets and liabilities as he likes—so long as the closing balances of one period coincide with the opening balances of the next, and it may be found necessary, when Life Insurance Companies develop to a greater extent in India, to consider some better method of taxing them

The decisions in the United Kingdom as to what do or do not constitute 'expenses of management in respect of which a repayment of tax is allowed when the company is taxed on the interest on investments and not on its actuarial profits are of no help under the Indian law

Insurance Companies—Profits—How computed—

A Company carried on the business of fire insurance and life insurance *Held,* (1) that the net profits of the two branches were assessable as one undivided income, and (2) in the life branch, the excess of the receipts of any year over the payments and expenses of that year, affords no criterion of the amount of profit This can only be ascertained by actuarial calculation

Per *Inglis, L P*—" Life policies are contracts of most variable endurance and the premiums are in many cases not annual payments The contracts may endure for the policy holder's life or for a certain number of years stated, or till the holder attains a certain age, and the company may be bound on the expiry of a fixed number of years or on the attainment of a certain age by the policy holder, either to pay a lump sum or an annuity for the remainder of the policy holder's life The premiums paid for such insurance may be paid all in one sum or by instalments within a fixed number of years, or annually during the holder's life, or during the subsistence of his policy The premiums there

fore, do in no sense represent the annual profits and gains of the company In like manner, the amount of claims in one year arising on the death of persons insured, or as a deduction from the company's receipts for the year, cannot afford any criterion for the ascertainment of profits A recently established company will receive a large amount of premiums, and have few or no claims to meet The profits and gains can be ascertained only by actuarial calculations and this actuarial calculation may be obtained by taking the result of the quinquennial investigation prescribed by statute or the periodical investigation in use in companies established before the statute, or by an investigation covering the three years prescribed by Schedule D of the Income tax Acts "[44 45]

As regards (1), see Rule 32, and as regards (2), the Indian Rules provide for such actuarial valuation

Annuities—Companies—

A life insurance society in the course of its business sold annuities, covenanting that its capital stock, funds, and property shall be liable in respect of the payment of such annuities *Held*, unanimously, reversing the decisions of the Divisional Court and the Court of Appeal, that the annuities were not payable out of the profits and gains of the society, and that the amount of the annuities paid may be taken into account as a disbursement in computing the taxable profits

Per *Halsbury, L C* —' You can no more refuse to take that cost (the payment of annuities) into your consideration when ascertaining the balance of profits and gains than you could the cost of the coals or the corn to the coal merchant and to the corn merchant in ascertaining what are the profits from his trade "[46]

This point, however, will not arise under the Indian law, for there is no prohibition against the deduction of annuities as in the United Kingdom

Insurance—Fire—Reserve Estimate—Question of fact—

In the *Imperial Fire Insurance Company* v *William Wilson*,[47] it was held that in computing the profits of a Fire Insurance Company, no deduction could be made from profits on account of "unearned premiums"

A Company carrying on the business of fire insurance, used to carry forward annually, in its published accounts, as a reserve, 40 per cent of the yearly premium receipts, representing estimated losses on unexpired risks, and claimed to be assessed on this basis It was found, as a fact, by the Commissioners that 40 per cent was a reasonable and proper allowance, and the Company's claim was admitted The Crown contended that the

(44 45) *Scottish Union and National Insurance Company* v *Smiles* 2 Tax Cases 551

(46) *Gresham Life Assurance Society* v *Styles* 3 Tax Cases 185

(47) 1 Tax Cases 71

Company was not legally entitled to the allowance *Held*, that there is no rule of law as to the admissibility of an allowance for unexpired risks in estimating profits, but the question is one to be decided by reference to the facts in each case and that, on the facts found in this case, the allowance claimed was a proper allowance to be made The previous cases were reviewed, and it was held that they laid down no principle of law though in many cases the Courts (including the House of Lords in *General Accident etc, Co v M Gowan*[48]) had declined to interfere, when the Commissioners had refused to allow any deduction for unexpired risks

Per *Lord Alverstone* — The question of what are profits or gains within the meaning of the Income tax Act is *prima facie* a question of fact and if the cases from *The Imperial Life Insurance Company v Wilson*[49 50] in the year 1876 down to *The General Accident Insurance Company v M Gowan*[48] in the year 1908 be examined it will be found that in every case the Courts have treated the question as one of fact and have merely decided whether upon the facts before them the claim of the tax payer to make a deduction in a particular way was justified

Per *Loreburn L C* — I am equally anxious that your Lordships should not be supposed to have laid down that the method applied by the Commissioners in the present case has any universal application If the Crown wishes in any future instance to dispute it they can do so by evidence and it is not to be presumed that it is either right or wrong A rule of thumb may be very desirable but cannot be substituted for the only Rule of Law that I know of viz that the true gains are to be ascertained as nearly as it can be done There is no rule of law as to the proper way of making an estimate There is no way of estimating which is right or wrong in itself It is a question of fact and figure whether the way of making the estimate in any case is the best way for that case

Per *Lord Haldane* — It is plain that the question of what is or is not profit or gain must primarily be one of fact and of fact to be ascertained by the tests applied in ordinary business Questions of law can only arise when (as was not the case here) some express statutory direction applies and excludes ordinary commercial practice or when by reason of its being impracticable to ascertain the facts sufficiently some presumption has to be invoked to fill the gap "[1]

Rule 29 of the Indian rules leaves it to the assessee company to decide what proportion shall be taken to Reserve So long as the Reserve is not used for any other purpose except to meet exceptional losses and outstanding liabilities, the amount taken to Reserve is deductible from the profits If the Reserve

(48) 5 Tax Cases 308
(49 50) 35 L. J [illegible] 1 1 Tax Cases 71
(1) *The Sun Insurance Office v Clarke* 6 Tax Cases 59

is used for any other purpose, the amount so deducted would be added back to the taxable profits

11 (1) The tax shall be payable by an assessee under the head "Professional earnings" in respect of the profits or gains of any profession or vocation followed by him.

Professional earnings

(2) Such profits or gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purposes of such profession or vocation, provided that no allowance shall be made on account of any personal expenses of the assessee

(3) Professional fees paid in any part of India to a person ordinarily resident in British India shall be deemed to be profits or gains chargeable under this head.

Previous law—

There was no corresponding provision in the law before 1918, all such income having been included in "other income" The changes made in 1922 are verbal, the words 'or gains' having been added in the first two sub sections, and the words 'profits or gains' having been substituted for 'income' in sub section 3

Profession and Vocation—

As to the meaning of the words 'profession' and 'vocation', see notes under section 4 (3) (*vii*)—Casual Profits

As to what constitutes a 'profession' as distinguished from 'business', see also the following Excess Profits Duty cases, in which the assessees were held to exercise a 'profession' and not carry on a 'business'

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Inland Revenue (income tax repayment agent)[8] See also *Inland Revenue* v *Marx*[9] set out under section 2 (4)

Illegal vocation—

The fact that a vocation is illegal does not affect liability to tax See *Partridge* v *Mallandaine* and other cases set out under section 4 (3) (*iii*)

Casual income—

As to income that arises from a profession, and casual income not so arising, see notes under section 4 (3) (*iii*) and decisions set out therein

Company—Profession of—

A company cannot exercise a profession It obviously can have no personal qualifications or activities which are necessary for the exercise of a profession See *Wm Esplen, Ltd* v *Inland Revenue*[10] (an Excess Profits Duty case) in which it was held that even though all the members of the company were professional men, (naval architects) and the nature of the work was precisely the same as that done by individual professional men, the company could not exercise a profession Also *Inland Revenue* v *Hamilton & Co*[11] (commercial travellers) and *Inland Revenue* v *Peter McIntyre, Ltd*[12] (auctioneers)

Capital expenditure—

See decisions set out under section 10 (2) (*ix*) The principles are the same whether it is a case of a business or a profession—see *Stott* v *Hoddinott* in particular, set out under section 10 The initial equipment of a professional man, *e g*, the library of a lawyer or the surgery of a surgeon or the fittings of a dentist would all be capital expenditure

Special allowances—

See section 4 (3) (*vi*) A profession or vocation though not an 'office' is certainly an employment of profit, and out of pocket expenses received by professional men from their clients are to be excluded from the income, as being 'expenses wholly and necessarily incurred in the performance of the duties' of the profession But even if that section does not cover such expenses, the second sub section of section 11 which is less strictly worded will cover such expenses

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(8) (1921) 2 K B 332

(9) 4 A T C 46 (C A)

(10) (1919) 2 K B 731

(11) 6 A T C 342 (C of A)

(12) 12 Tax Cases 1006

Personal expenses—

As regards examples, see *Bowers v Harding* set out under section 4 (3) (*ii*) Municipal taxes, charities and household expenses, for example, are all 'personal expenses'

Deductions—

As to 'capital expenditure' and 'solely incurred for earning the profits' see notes under section 10 (2) (*ix*)

Notional deductions are not permitted—see *Commissioners of Inland Revenue v Marx, infra*

Voluntary payments—

Whether payments are made to the assessee voluntarily or not does not affect the taxability of the income See the group of cases set out under section 4 (3) (*iii*)

Fees earned outside British India—

See section 4 (1) —Sub section (3) of section 11 is one of the exceptions to the principle in the Act that income, in order to be taxable, must either accrue or arise in British India, or be received therein If the income is not from a profession but from "other sources," if it accrues or arises outside British India without being received in British India, it cannot be taxed This is the only difference between sections 11 and 12

As this sub section applies to professional 'fees' only, it would not be correct to hold that a professional money lender should be charged to tax on interest earned outside British India and not brought into it Such interest can by no stretch of language be 'fees'

It should be noted that the sub section applies only to persons ordinarily resident in British India Whether a person is so ordinarily resident or not would be a question of fact

As to the meaning of the word 'resident' see notes under section 4 (2), and to that of the word 'ordinary' see per *Lord Sumner* in *Lysaght v Commissioners of Inland Revenue* It means 'as part of the regular order of a man's life'

Method of Accounting—

See section 13, which governs this section

United Kingdom Law—

The English law is much the same, the principal difference being that since 1925, depreciation and obsolescence allowance may be claimed in respect of machinery, plant, etc, used in a profession In India, though no depreciation allowance is permissible, the cost of renewals (short of complete replacement) is probably allowed in practice as an expense solely incurred for earning the profits

Law Books—Obsolescence—Claim—

In *Daphne* v *Shaw*, 62 L J N S 321, Rowlatt, J held that law books were not plant and disallowed a claim in respect of their becoming decayed or obsolete

> It (plant and machinery) conjures up before the mind something clear in outline at any rate it means apparatus alive or dead stationary or movable to achieve the operations which a person wants to achieve in his vocation "

In India it was held by the Judicial Commissioners, Nagpur that the replacement of old law books is capital expenditure [13]

Decisions—

The decisions that are set out below supplement those set out under section 4 (3) (*vi*) and (*vii*) which should also be referred to.

Travelling expenses—Clerk to Justices—

A solicitor residing and carrying on his profession at Worcester was Clerk to the Justices at Bromyard *Held*, that he was not entitled to deduct from the emoluments of his office the cost of travelling between Worcester and Bromyard [14]

Travelling expenses—Directors of a company—

The Directors of a Company had to travel from their residence to the place of meeting of the Company *Held*, that the travelling expenses were not an allowable deduction from their income [15] See also *Ricketts* v *Colquhoun*, and other cases set out under section 4 (3) (*vi*)

Motor car—Lawyer—

Expenditure incurred by a lawyer in maintaining a motor car is not an admissible deduction from his professional earnings unless he can show that the car was required *solely* for *his professional purposes* [16]

Voluntary payments to subordinates—

Voluntary contributions made by a minister towards the stipend of his assistant minister were held to be not an allowable deduction The Court considered, though there were no words the English Act to this effect, that the deduction was allowed expenditure incurred by the personal performance of the duty, d not for getting help to relieve him of this personal duty [17]

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(13) *Sir Hari Singh Gour* v *Commissioner of Income tax* 3 I T C 333

(14) *Cook* v *Knot* 2 Tax Cases 240

(15) *Revell* v *Directors of Elworthy Brothers & Co Ltd* 3 Tax Cases 12

(16) *Sir Hari Singh Gour* v *Commissioner of Income tax C P* 3 I T C 333

(17) *Lothian* v *Macrae*, 2 Tax Cases 65

Subscriptions to professional societies—

Subscriptions to professional societies or purchasing professional journals are not wholly or necessarily incurred for the performance of the office or exercise of the profession—in the case of a doctor, for instance

Per *Roulatt, J* — 'He does not belong to the society in order that he may get the journals and read them to the patients He is (only) qualifying himself in order that he may continue to hold his office '[18]

Money advanced to clients—

Money advanced by a law agent to a client and lost will be deductible from the law agent's profits only if the making of loans of the kind is an ordinary incident in the law agent's professional work or business Loans which are bald advances to comparatively new clients would, therefore, not be deductible Lending money to clients may often be done by solicitors but it is not an essential and ordinary part of their profession The law is not concerned with the motives for such transactions, and no custom can rest on what an individual solicitor does[19]

Notional deductions—Not permissible—

An inventor and consulting engineer earned fees as a Consulting Engineer, and royalties as an Inventor In addition he obtained orders for machinery, and supplied them at his own cost making a profit In connection with Excess Profits Duty, the question arose whether a deduction could be made from these profits on account of (1) the royalties—which he would have got if others had made the machines, (2) the work done by him as Engineer in drawing up specifications, etc *Held*, that the case could be distinguished from *Maxse v Commissioner of Inland Revenue*,[20] and that it was impossible to deduct a notional sum to represent the skill contributed by the owner of the business, or to allow royalties which were in fact not paid to any one[21]

12 (1) The tax shall be payable by an assessee under the head "Other sources in respect of income, profits and gains of every kind and from every source to which this Act applies (if not included under any of the preceding heads)

Other sources

(18) *Simpson v Tate* 9 Tax Cases 314

(19) *Hagart & Burn Murdoch v C I R* 45 T L R 338 (1929) A C 386

(20) (1919) 1 K B 647

(21) *Commissioners of Inland Revenue v Marx*, 4 A T C 467

(2) Such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee

Previous law—

In the 1886 Act, there was no similar provision The 1918 Act was the same as the present except that (1) the words 'and gains' have been added after 'profits' throughout the section, (2) the reference excepting agricultural income, which was superfluous, has been omitted and (3) the words "making or earning such income, profits or gains" have replaced "making such income or earning such profits"

United Kingdom Law—

This corresponds to Case VI of Schedule D of the English Act that is, it is, so to speak, a residuary section An important feature in the English law is that, in computing income under Case VI, no deductions are permitted

Method of accounting—

As to how profits should be computed, see section 13

Deductions—

See notes under section 10 (2) (*iii*)—Taxes and Cesses, also about 'Capital expenditure' and 'solely incurred for the purpose of making profits etc, under clause (*ix*) of sub section (2) of that section

Interest on borrowings—

The interest paid on money borrowed for the purchase of shares or securities can only be set against the income obtained from the shares or securities, where it is proved either by a banker's certificate or otherwise that the borrowing has been definitely and solely for that purpose, but where such proof is afforded, an allowance should be given (*Income tax Manual*, para 52) This is a concession given outside the Act

See also notes under section 8

Nature of income included under "other sources"—

Income derived by an assessee from dividends of a company or from his share in a firm or from royalties, minerals or other natural deposits would all fall under income from 'other

sources' so far as he is individually concerned It is not possible to exhaust by enumeration the categories of income that can fall under this head As examples however may be given, interest on Bank deposits or loans, illegal cesses levied by landlords, income from fisheries, market places (other than property under section 9), etc, royalties on account of patents, etc Examiner's fees, rewards, and director's fees, would more often fall under 'salaries' or 'professional earnings' than under 'other sources'

In *Sir Hari Singh Gour's case*,[22] it was held that income from a University Examinership fell under "Other sources"

Interest on outstandings after business wound up—

When a trader or a professional man dies or stops his business or profession, and outstandings have to be collected in respect of goods supplied or services rendered during the life of the business or profession, such receipts are not ordinarily assessable They represent money earned during the life of the business or profession and are covered by the assessments made during the life of the business or profession It is immaterial for this purpose whether the assessments were made on the basis of bookings or on the basis of receipts But, interest stands on a special footing It is payment by time for the use of money Though, when a business lasts, interest may be a part of trade receipts, it does not follow that interest ceases to be earned after the ending of the trade The interest bearing debts which remain produce an income which is liable to tax See dicta of Rowlatt, J in *Bennett v Ogston*, 9 A T C 182

The taxability of such receipts in India is governed by section 4 (3) (*vii*) Ex hypothesi, they would not arise from a business or vocation, but they may be recurring, in which case both the debts in so far as they represent circulating capital or services rendered, and the interest may be taxable, if the business or profession when it lasted had been taxed on a cash basis under section 13 Otherwise only interest would be taxable to the extent that it had not already been taxed on a mercantile basis In either case, if the receipts are non recurring, there would be no liability to tax

Recurring gifts—

See notes under section 4 (3) (*vii*) If such gifts are taxable, they would be taxed under this section as income from 'other sources' So also maintenance allowances from Hindu undivided families if such allowances are taxable separately in the hands of the recipient

(22) 3 I T C 350

(2) Such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee

Previous law—

In the 1886 Act, there was no similar provision The 1918 Act was the same as the present except that (1) the words 'and gains' have been added after 'profits' throughout the section, (2) the reference excepting agricultural income, which was superfluous, has been omitted, and (3) the words "making or earning such income, profits or gains" have replaced "making such income or earning such profits"

United Kingdom Law—

This corresponds to Case VI of Schedule D of the English Act that is, it is, so to speak, a residuary section An important feature in the English law is that, in computing income under Case VI, no deductions are permitted

Method of accounting—

As to how profits should be computed, see section 13

Deductions—

See notes under section 10 (2) (*ix*)—Taxes and Cesses, also about 'Capital expenditure' and 'solely incurred for the purpose of making profits' etc, under clause (*ix*) of sub section (2) of that section

Interest on borrowings—

The interest paid on money borrowed for the purchase of shares or securities can only be set against the income obtained from the shares or securities, where it is proved either by a banker's certificate or otherwise that the borrowing has been definitely and solely for that purpose, but where such proof is afforded, an allowance should be given (*Income tax Manual*, para 52) This is a concession given outside the Act

See also notes under section 8

Nature of income included under 'other sources"—

Income derived by an assessee from dividends of a company or from his share in a firm or from royalties, minerals or other natural deposits would all fall under income from 'other

sources' so far as he is individually concerned. It is not possible to exhaust by enumeration the categories of income that can fall under this head As examples however may be given, interest on Bank deposits or loans, illegal cesses levied by landlords, income from fisheries, market places (other than property under section 9), etc, royalties on account of patents, etc Examiner's fees, rewards, and director's fees, would more often fall under 'salaries' or 'professional earnings' than under 'other sources'

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(22) 3 I T C 350

A clergyman received an annuity from a Charitable Fund on retiring through ill health. The annuity was conditional on his completely resigning the parish. The income of the Fund *as a charitable fund* was exempt from tax. *Held,* that the annuity was taxable not as profits of office but as annual profits under Schedule D.[23]

(In India also this would be taxable not as profits of office, *i e* salaries under section 7 or professional earnings under section 11 but as recurring income under 'income from other sources'—section 12.)

Deed of separation—Payment to wife—

In *Dalrymple v. Dalrymple*[24] it was held that a payment made to a wife under a deed of separation was taxable, as it was payable as a personal debt or obligation in virtue of a contract as distinguished from a gift, and that the husband was entitled to deduct tax. In India, the tax could not be deducted at source on such payments, as they are not annuities paid by employers, but such payments are evidently taxable as income from other sources under section 12.

Trustee—Income of—

The remuneration of a Trustee would be income from 'other sources'. A trustee has no 'employer' and his income cannot be 'salary'. Nor can it be income from a 'profession or vocation'.[25]

Depreciation—

No allowance can be claimed on account of depreciation except in respect of business falling under section 10. See dicta in *In re Gooptu Estates, Ltd (Calcutta)*.[25a]

Expenses incurred in purchasing mortgaged property—

The mere giving of security by a purchaser of property in a Court auction is not deductible expenditure.[26] Query—What about the interest on borrowing if the security money is borrowed? Expenses incurred by the purchaser over Mutation fees and the like when taking possession are also not deductible.[26] The question whether payment in satisfaction of a decree in favour of a prior creditor may be deducted from

(23) *Duncan's Executors v. Farmer* 5 Tax Cases 417

(24) (1902) 4 F 545

(25) See *Baxendale v. Murphy*, 9 Tax Cases 76

(25-a) 4 I T C 146

(26) *Raja Raghunandan Prasad Singh and another v. Commissioner of Income tax* 9 Pat 48

taxable profits was left open but it is presumably capital expenditure

Annuities—

Annuities not of the nature described in section 7, i e, annuities not paid by Government, etc, or by an employer fall under this section

An annuity is taxable in full although capital may have been sunk in purchasing it, nor is any difference made between terminable and perpetual annuities [27]

To ascertain whether a so called annuity is really an annuity for income tax purposes, the substance of the transaction must be looked to, and not merely the name [28]

Receipts from royalties—

Income derived from royalties and rents is ordinarily not income derived from business [29]

Provident Funds—Payments from—

Where a trust has been created in respect of a Provident Fund and the employer pays his contributions into the Trust Funds, the contributions actually received by the employee are taxable under section 12 and not under section 7 as salaries, since the trust is not his employer Tax on all payments under section 7 is deductible at source under section 18, whereas payments taxable under section 12 can only be taxed after assessment under section 23 (and section 34) These remarks do not apply to 'recognised' provident funds as to which see section 58 H

Method of accounting

13. Income, profits and gains shall be computed, for the purposes of section 10, 11 and 12, in accordance with the method of accounting regularly employed by the assessee

Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine

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(27) *Coltness Iron Company v Black* 1 Tax Cases 287

(28) *Stan's Guaranteed Railway v Wyatt* 2 Tax Cases 584 *Scoble v Secretary of State*, 4 Tax Cases 618

(29) *In re Raja Jyoti Prasad Singh Deo*, 1 I T C 103

Method of accounting regularly employed —

The method of accounting regularly employed by an assessee for the purposes of his business should so far as possible be the method adopted for working out his profits for income tax purposes but the Income tax Officer has to decide whether that method of accounting is the one regularly employed for the purposes of the assessee's business and whether it is such as to reflect clearly the taxable profits for the previous year In most cases this should cause no difficulty Doubtful cases should be referred to higher authorities As an example of the principles to be followed in settling doubtful cases two instances of such cases are given It is the practice amongst certain merchants to prepare their accounts on the basis of the mercantile accountancy system in respect of transactions between themselves and members of their own community but on the basis of cash payments in the case of transactions between themselves and their customers Provided that the same system is continuously employed there appears to be no reason why this particular practice should not be considered to be a method of accounting regularly employed Again there are cases where the various branches of a business are only closed down once in three or five years and where the accounts of the branches are not annually incorporated in the headquarters business accounts In such a case it might be possible to assess either on the average annual profits of the branches as disclosed by the accounts last filed or on the actual profits brought to account owing to particular branches closing down in particular years

The cases in which an assessee desires to change his accounting system should be rare and where such a request is made the Income tax Officer in considering it should as in the similar case of a demand for change in the previous year if he is prepared to allow the change take steps to secure that no profits escape taxation on account of the change While section 13 leaves it to the discretion of the Income tax Officer to decide whether a particular system of accounting should be accepted or whether a change in the system of accounting should be allowed the discretion of the Income tax Officer in this matter can be questioned in the course of an appeal against an assessment under *section 30 i e it may be* made one of the grounds of appeal in contesting the assessment of the profits (*Income tax Manual* para 38)

Scope of section—

Broadly speaking, the law is as below —If the assessee files a proper return of his income, he will be assessed on his income computed (with or without examination of his accounts, according to circumstances) according to the method of accounting that he has regularly employed If he regularly employs the cash method of accounting his income will be computed on the cash basis If he regularly employs the mercantile system, his income will be computed according to the mercantile system If he regularly employs some reasonable and consistent combination of the cash and mercantile systems, for example, follow

ing the one system for some kinds of transactions and the other for other kinds of transactions, his income will be computed accordingly It must not be forgotten, however, that if an assessee has not produced his accounts regularly before the Income tax authorities it may be difficult or impossible for him to prove that he has *regularly* employed any method of accounting If he has not regularly employed any method of accounting, the Income tax Officer has to determine upon what basis, and in what manner, the income shall be computed The Income tax Officer has the same discretion if, in his opinion, the method regularly employed is such that the income cannot properly be deduced therefrom

If an assessee has not made a return substantially fulfilling or purporting to fulfil the requirements of section 22 (2) of the Act, and Rule 19 of the Rules under the Act, it is the duty of the Income tax Officer under section 23 (4) to determine the income to the best of his judgment He is then not bound to call for the assessee s accounts If he does call for them, he has full discretion as to the use that he should make of them, and whether he calls for them or not, the assessee has no appeal against his decision

Methods of accounting—

There are two main systems of keeping accounts There is firstly the cash basis system where a record is kept of actual receipts and actual payments entries being made only when money is actually collected or disbursed There is secondly the mercantile accountancy system under which a profit and loss account is maintained and a comparison is made of the value of the stock in hand at the beginning and at the end of each year Under this latter system entries are made in the accounts on the date not of receipt of money or expenditure of money but on the date of transactions irrespective of the date of payment When goods are sold for example an entry is made at once on the receipt side of the account although no cash may be received at the time in payment of such goods and an entry is similarly made on the debit side when a liability is incurred although payment on account of such liability may not be made at the time It will be the method of accounting adopted for or by the tax payer therefore that will determine the period within which any item of gross revenue or any deduction therefrom is to be accounted for and which will determine whether particular allowances are or are not permissible

It is for this reason that the Act does not contain a complete statement of the deductions or allowances that are permissible or not permissible in working out business profits or professional earnings since certain alowances or deductions can only occur where the mercantile accountancy system is adopted There can for example be no allowance for "bad debts" where the cash basis is the method of accountancy employed Under the mercantile accountancy system as noted above, an

entry is made on the receipt side when a sale is concluded, although the money on account of such a sale has not been paid and in making up the accounts at the end of the year such entries are treated as receipts and the tax is levied on these "book profits". It may happen that some of these "book profits" cannot be recovered; they are written off as bad debts when found to be irrecoverable and since such "book profits" have been included in the income assessed to income tax, the "bad debts" must be written off against the "book profits" in the year in which they are written off in the accounts as irrecoverable. Where the cash system is adopted there can be no bad debts.

Again it will be the method of accounting that will determine the particular year in which allowances common to both systems of keeping accounts may be made. In sub-section (2) of section 10 of the Act provision is made for allowances on account of rent paid, interest paid on capital borrowed, the amount of premium paid in respect of certain classes of insurance, amount paid on account of current repairs, etc., and sub-section (3) of section 10 states that the word "paid" means "actually paid or incurred according to the method of accounting upon the basis of which profits or gains are computed", i.e., where the cash basis is adopted it will be the date of actual payment that will determine the year in which such allowances may be made, whereas if the mercantile accountancy system is adopted the allowances can be claimed in the year in which liability to pay accrued. (*Income tax Manual*, para 37.)

Origin of this section—

Difficulties had been experienced in regard to the assessment of business profits under the Act of 1918, owing to the ruling of the Madras High Court in *Board of Revenue v. Arunachalam Chetti*[70] that the word 'income' in section 3 of that Act [corresponding to section 4 (1) of the present Act] meant 'income actually or constructively received' and that the use of the word in that sense in section 3 restricted and limited any interpretation to be placed upon the following sections of the Act which specified the income liable to tax. Had this interpretation been strictly followed, considerable inconvenience would have been caused to assessees who kept their accounts not on the basis of sums actually received and sums actually paid out but on the principles of mercantile accountancy, by the preparation of a Profit and Loss Account and the comparison of the value of the stock in hand at the beginning and end of each year, since such assessees would have been required to recast the whole of their accounts on a cash basis for income tax returns. The provisions of sections 3, 4 and 6 to 12 of the Act were, therefore, re-worded in order to make it clear that the tax is chargeable not on 'income' calculated on actual receipts and expenditure but on the "profits and gains"

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70. (1922) 1 I T C 75

as set out and defined in those sections, while section 13 makes it clear that no uniform method of accounting is prescribed for all tax-payers, and that every tax payer may, so far as possible, adopt such form and system of accounting as is best suited for his purposes The words "in respect of sums paid, or, in the case of depreciation debited", which occur in section 9 (2) of the Act of 1918, were also omitted, and sub section (3) of section 10 of the new Act was inserted, so that there may be no doubt that the assessee may adopt either a cash basis or a mercantile accountancy basis as his regular system of keeping accounts It should be particularly noted that these provisions apply under section 13 of the Act only to the income, profits and gains mentioned in sections 10, 11 and 12 of the Act

In the Madras case (*Board of Revenue v Arunachalam Chetti*)[33] which gave rise to this section, the point in issue was whether interest that had accrued in the year, but neither been received nor adjusted in the accounts, could be taxed A Full Bench of the Madras High Court decided against the Crown, Sadasiva Aiyar, J dissenting Sadasiva Aiyar, J, held that the interest would be taxable, though not realized, if it came so completely under the assessee's control that by an act of his will he could receive it in cash without greater trouble than is involved in drawing money from his bankers

United Kingdom Practice—

The principle of section 13, *viz*, that the assessee is bound by his own acts of book keeping,—unless the book keeping itself is at variance with facts, about which see *Craig v Inland Revenue*, infra, has been laid down in various English rulings the dicta in which are cited below

In fact, it is on this principle that all English Courts have acted, and even though there is no provision of the law in England corresponding to the present section 13 of the Indian Act, assessments have been made on this principle all along, in cases in which accounts are maintained on the mercantile basis In fact, there would be no point in the provision for doubtful debts' which exists in the English law—and it has existed for a very long time, indeed since 1853—if all accounts were to be kept on the 'cash' system

"The balance sheets, of course do not serve to alter the liabilities of the tax payer, they are not used for the purpose of constituting some admission of liability or something which would stop them from having the Act properly administered, but they are of some use as showing what,

(33) 1 I T C 75

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(33) 1 I T C 75

is a matter of fact is the true and proper way of dealing with these receipts '[34]

"One of the learned judges in the Court of Appeal seems to have thought that the case might have been different if the County Council had made some appropriation of their funds, though it is difficult to see how any account keeping by the debtor could alter the rights of the Crown [35]

"This argument would seem to make the rights of the Crown depend on the book keeping of the company, but this cannot be, nor do I think the liabilities of the company can be made to depend on their system of accounts '[36]

But the mode of book keeping followed by the company is not conclusive of the true character of the expenditure "[37]

Basis of accounting—

As to 'receipts' not being confined to cash receipts, see *Hall & Co* v *Commissioners of Inland Revenue*,[38] the dictum from the judgment of M R Esher in *City of London Corporation* v *Styles* and M R Sterndale's comments thereon—see notes under section 10

As to how far accounts should represent facts, it is obviously not possible to lay down any general principles Like all questions of fact, such questions depend for their answers partly on the facts of each case and partly on commercial usage and the practice of the assessee As will be seen from the following, difficult questions may arise in practice, and in many cases an equitable solution is likely to rest on what is logically a compromise So long as the same income is not taxed twice over and so long as income is not taxed *before* it arises, except with the consent, either express or implied, the latter often resting on the method of accountancy regularly employed, of the assessee, it is presumed that no Court will interfere These are all questions about which the law is silent and the courts will presumably apply 'equity, justice and good conscience' in settling them

First, as regards *stock* which also includes in this connection consumable stores[39] The closing balance (both quantity

(34) Per Hamilton J in *Liverpool and London and Globe Insurance Co* v *Bennett* 6 Tax Cases 327

(35) Per Lord Davey in *Attorney General* v *London County Council*, 4 Tax Cases 265

(36) Per Lord Gorell in *Edinburgh Life Assurance Co* v *Lord Advocate* 5 Tax Cases 472

(37) *Glenboig Union Fireclay Co* v *Commissioners of Inland Revenue*, 1921 S C 400, 12 Tax Cases 427

(38) (C of A) 12 Tax Cases 382

(39) *George Thompson, Ltd* v *Inland Revenue*, 12 Tax Cases 109

and value) of the previous year must agree with the opening balance of the year under consideration In the face of this in *Commissioner of Income tax v Chengalvaraya Chetti*[40] the assessee claimed to value the stock in the closing balance of the previous year at the market price and in the opening balance of the current year at cost price, which was much higher Needless to say, the claim was not allowed by the High Court As Coutts Trotter, C J, put it—

> "The question is not so much of law but of business common sense"

And as Krishnan, J, put it—

> "Having been allowed to treat his loss as one on the stock in hand in the previous year he cannot be allowed again to treat it as a loss on the sales in respect of the same stock next year "

The next point is whether an assessee should take his closing stock at market value or cost price, and, if the former, whether he is entitled to estimate it as he likes As regards the first part of the question, there would apparently be nothing wrong in the assessee choosing whichever alternative he prefers, provided always of course that the next year's opening balance is taken at the same value Actual commercial practice varies, and it is most common to follow the practice of valuing on whichever is the lower basis But it would not be open to the concern to under-estimate the market value 'Market value' is a matter of *fact*, and like all other questions of fact it is entirely for the Income tax Officer to decide what is a fair market value In deciding this question of fact, the relevant evidence would be (1) Invoices, (2) Sales, (3) Transactions of other assessees doing similar business, (4) Government statistics, etc

It is usual to value stock of half finished or finished goods at raw material plus labour, but this is not necessary when finished goods can be valued with reference to the market The 'cost' price of raw materials would be valued so as to include freight, etc, when the 'cost price' basis of valuation is adopted in respect of the closing stocks Whether the valuation is on a 'cost price' basis or on the 'market value' basis, an assessee cannot put any valuation he likes on the stock In either case the valuation should accord with facts

It is of course obvious that when the accounts do not show the opening and closing stock balances, the profit or loss account

(40) 2 I T C 14, 48 Mad 836

cannot be ascertained from the books whether the accounts are on a cash or on accrued basis See also *Ballhakissan Ramnarain case*[41]

Trading stock in hand—Valuation of—

Trading stock in hand means stock in which property has passed to the assessee[42] or that which is in the actual possession or under the sole control of the trader[43]

The Excess Profits Duty Acts referred to 'trading stock in hand' and also referred in other parts to stock 'which had not come into possession' etc Under these Acts it was held that goods not in actual possession of assessees or agents no bills of lading invoices or insurance policies or certificates in relation to such goods having been tendered or delivered to assessees or agents is not stock' Even the passing of property in goods or the acquisition of disposing power is not enough to make it 'trading stock in the absence of delivery[44] Delivery of bills of lading etc for example is equal to delivery of goods for purpose of passing property but stock in trade is decided in Wills, etc, is not the same as trading stock in hand' for calculating profit and loss[45]

At the same point of time the same stock could not belong both to the purchaser and to the seller Till the property passes to the purchaser it is obviously the stock of the seller To say that a person had grain in hand merely because by business arrangements which were in course of performance he had put himself in a position to deal with purchasers in the security of being able to perform in his turn is merely a figure of speech like having 10 minutes in hand to catch a train' or finishing a race with several lengths in hand at the winning post per *Lord Sumner*[46]

Per the *Lord President* in *Inland Revenue v Marshall*[47] It is not for the court to fix principles of valuation for a principle of valuation is not a part of the law universal at all but of course it is necessary sometimes to ask the court whether a particular principle of valuation if adopted,

(41) 3 I T C 366

(42) Per Rowlatt J and the Master of the Rolls in *Benjamin Smith & Sons v Commissioners of Inland Revenue*

(43) *Cohen & Co v Commissioners of Inland Revenue* 6 A T C 401 and L 13 ... and ... *Benjamin Smith & Sons v Commissioners of Inland Revenue*

(44) *Cohen & Co v Commissioners of Inland Revenue* 6 A T C 4 1

(45) *Liddell Bros v Clemens Horst & Co* (1912) A C 13

(46) *Benjamin Smith & Sons v Inland Revenue* (H L) A T C 13

(47) 14 Tax Cases 319

would or would not accord with the prescription of the Income tax Acts

In a case in which (1) there was no actual market—either for purchase or for sale—for the goods on the date of closing the accounts and (2) defective goods were to be replaced by the suppliers, it was held by the Special Commissioners (*a*) that the stock should be valued as though the stock had been ordered from the suppliers and supplied on the date of closing accounts due allowance being made for adjustments in wages, etc, and (*b*) that cloth found to be defective should be written up if already written down, because the supplier was bound to replace the goods, Rowlatt, J confirmed the action of the Special Commissioners [48]

Running contracts—

If the accounts are so kept that the profits in any given period can be ascertained, naturally the Income tax Officer will accept such accounts, otherwise he will assess under sections 23 (3) and 13, unless owing to some default of the assessee, the assessment is made under section 23 (4)

It would be wrong to carry into the accounts as profits of one year the estimated profits which would accrue in subsequent years that might perhaps never be made at all —Per M R Sterndale in *Hall & Co v Commissioners of Inland Revenue* [49]

No person would dream of including profits in his yearly balance sheet which would not be made until the goods had been actually delivered in respect of some contract which was to run over a period of two years and possibly more —Per Atkin L J (*ibid*)

The only proper way in which the profits arising from the working out of this contract ought to be brought into account is to ascertain them as and when realised as if they were not preceded by any contract at all —Per Younger L J (*ibid*)

'Realised' here does not mean realised in cash or by set off, in this case the Lower Court held that the profits on the running contract should be brought into account when the contracts are made, and this judgment was overruled by the Court of Appeal

As regards accounts running into several years in respect of which Profit and Loss are not struck every year but only finally after the completion of a group of transactions, see *Bansilal Abirchand v Commissioner of Income tax, C P* [50] and

(48) *Brigg Neumann & Co v Commissioner of Inland Revenue* 7 A T C 269
(49) 1 A T C 271 12 Tax Cases 38
(50) 3 I T C 57

Gour's case.[1]

Consignment accounts—

If the assessee keeps suspense accounts for each consignment or 'venture' till it is closed, it follows that until the profit is transferred from 'suspense' to 'profit and loss' no income arises for taxation. Otherwise the Income-tax Officer would have no option except to take into account the net balance of the consignment account, or estimate as best he can under section 23 (3) and section 13, or as a result of some default on the part of the assessee, under section 23 (4).

Debits and credits—When to be entered—

Under the 'mercantile' system of accounting, when a debit note is presented the debt should appear in the accounts. A debit note means a debt *in presente*. Similarly if a contract is cancelled and compensation received for the breach in instalments, the compensation should appear as a receipt when the compensation is settled.[2]

Stock values—Alteration of—

It is a cardinal rule of book-keeping—whatever the method adopted—that the opening balances of stock in one year should be the same as the closing balances of the preceding year.[3]

At the same time if the opening and closing stocks of a business in a given year are both undervalued, the real profits of the business in that year cannot be ascertained by merely raising the valuation of the closing stock, without taking into consideration the similar undervaluation of the opening stock. The method of introducing stock into each side of a profit and loss account for the purpose of determining the annual profits does not necessarily depend upon exact trade valuations being given to each article of stock that is so introduced. The one thing that is essential is that there should be a definite method of valuation adopted which should be carried through from year to year, so that in case of any deviation from strict market values in the entry of the stock at the close of one year it will be rectified by the accounts in the next year. It may, of course, be that in so adjusting the figures of stock there may be special cases in which the valuation is so treated as justly to cause it to be open to dispute. But whatever the correct position about such cases, it is clear that if the method of altering both valuations is not adopted the profit which is brought forward is not the real one.[4]

(1) 3 I. T. C. 346.

(2) *Jesse Robinson & Sons v. C. I. R.*, 8 A. T. C. 125.

(3) *Commissioner of Income-tax v. Chengalvaraya Chetti*, 2 I. T. C. 14.

(4) *Commissioner of Income-tax, Bombay v. The Ahmedabad New Cotton Mills Company, Ltd.*, 57 I. A. 21: 54 B. 213: 58 M. L. J. 204 (P. C.).

Valuation—Opening balances—Proof of—

Three banks went into liquidation, and three companies were formed to realise and distribute the respective assets. Later on a new company took over, to nurse, develop and realise the assets of these three companies, who were paid for in the shape of debenture stock and paid up shares in the new Company. The amounts allotted to each company were in accordance with the book values of the assets of each company. The new company sold the assets gradually and bought off or paid off the debentures. It also declared a bonus on the shares and gave debenture stock as bonus. Under the articles of association, no dividend could be paid except out of profits. *Held* by the Privy Council that (1) the profits of the company were taxable, (2) the company was entitled to hold in suspense some reserve to meet losses, (3) the profits were earned when distributed to shareholders.

Per *Lord Dunedin*—There remains however a difficulty as to proof of the exact figure. It does not seem to their Lordships that the mere fact that an investment standing in the books at *x* pounds realizes on sale *x* plus *y* pounds settles that a profit of *y* pounds has been made. It is not that their Lordships doubt that the initial figure in the books may be taken. These figures represent in their Lordships' view real values for so the parties have treated them. It was argued that they were mere valuations. In one sense that is true for not being put to the test of the market at the moment the only way to affix a value was by valuation. But that they represent real value seems certain because unless they did it would have been impossible to regulate justly the share which each member of the three assets companies was to get in the new mixed mass of assets—or in other words what shares and debentures he should get in the new Company. But it is possible that other investments on realisation may show loss instead of profit and it is obvious that it is in the totality of the transactions that the question of profit comes to be fixed.

Their Lordships are however of opinion that the company may well be held bound by its own actions.[4-a]

Accruals of debt—

Section 13 cannot make the mere accrual of a debt income unless the method of accounting adopted by the assessee is such that all accrued debts enter into his profit and loss account. Even if he does not prepare a formal profit and loss account, does he so keep his accounts as though the income had been received? In commercial practice, and under a strict system of double entry book keeping, though it is true that the profit or loss is really a notional figure represented by the balancing of certain debits and credits, it is not *every* account in the ledger that enters

(4-a) *Commissioners of Taxes v. Melbourne Trust* (1914) A. C. 1001 (P. C.)

into the Profit and Loss account Receipts which are due but which cannot be realised might conceivably be taken to a "suspense" head which would not enter into the Profit and Loss account It is not open to an assessee, however, to adopt a method which would defeat the claim of the Crown to tax and which is not in accordance with his regular methods of accounting If he changes his methods of accounting it would clearly be open to the Income tax Officer to declare that the assessee does not *regularly* adopt any method of accounting and to compute the profits according to his own discretion

Book keeping—Not conclusive—

At the same time, by mere book keeping, an assessee cannot be held liable for what he is clearly not taxable upon In *Craig v Inland Revenue*, a company purchased a going concern for £25,000 For book keeping purposes, £5,625 was taken as stock-in trade On the basis of actual stock-taking, stock was found to be £12,798 The difference £7,173 (subsequently altered to £6,635) between the assumed and real values of stock was carried to a stock suspense account In the balance sheet, the sum of £6,635 was shown as a Reserve Fund The Commissioners held that this sum of £6,635 was taxable profits *Held*, that the *real* value of stock should be taken into account in computing the profits, and that mere book keeping is not conclusive A somewhat similar view was taken by the Judicial Commissioner of Nagpur in *Pandit Pandurang's case*[6]

Two partners trading as wholesale soft goods merchants and drapers formed a private company of themselves In transferring the business to the company, the value of stock was written up by £15,000, and the question arose whether the share of each partner of this £15,000 was taxable *Held* by the Privy Council that there was no sale, there being only a book keeping entry out of which the partners did not make any real profits, and that if there was a sale, the receipt was capital and not income The decision in *Craig v Inland Revenue*,[7] *viz*, that by merely over estimating or under estimating assets profits cannot be made where in fact there are no profits, was approved [8]

See also the case of *Trustees Corporation v Commissioner of Income tax, Bombay*, set out under section 10 (2) (ix).

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(5) (1914) Sc. L. R. 321
(6) 2 I. T. C. 63
(7-8) *Doughty v. Commissioners of Taxes* (1927) A. C. 327 (P. C.)

Foreign income—Constructive receipt of—British India, in—

That an assessee cannot keep accounts in one way for his own convenience and claim to have his profits computed in a different way for assessment to income tax was emphasised in *A T K. P.L S P. Subramaniam Chettiar v Commissioner of Income-tax*[9] In that case the assessee had a business of his own in Rangoon and a business, in partnership, at Penang Money was transferred from Rangoon to Penang, and interest was adjusted in the books at Rangoon as having been received from Penang The assessee claimed on the authority of *Gresham Life Assurance v. Bishop*[10] that the money representing the interest had not in fact been received in British India The claim was not upheld The *ratio decidendi* was that according to the assessee's own method of book keeping it was clear that there had been a constructive receipt, and that according to the method of keeping accounts it was immaterial whether the creditor was in British India or abroad

Following the above ruling it was held by the same High Court in *S V L L Lakshmanan Chettiar's case*,[11] that even if the debtor is outside British India and the interest is not physically brought therein, the interest is taxable if it has fallen due and been credited in the accounts of the assessee as received

Though it is common among Chetti firms, while purporting to charge interest on loans to branches from the head office and showing such interest in the accounts, never in fact to recover such interest, which is calculated *pro forma* only in order to settle the commission payable to the branch agents, yet, if it is found that, in fact, interest is paid by a foreign branch to the head office or a branch in British India, such interest is taxable *A R A R S M Somasundaram Chettiyar v Commissioner of Income tax, Burma*[12]

Profits—When arising—

"As regards the question of when a profit is earned their Lordships' view is that a profit can be said to be earned when it is dealt with as a profit In ordinary cases this synchronizes with the realization of the sums which swell the assets of the person or company and which entering the account (whether on the creditor or debtor side will depend on the particular account in view) go to bring out the balance which is deemed profit But for the reasons already given, their Lordships think that in a case like this the company are entitled to hold at least a part

(9) 50 Mad 765
(10) 4 Tax Cases 464
(11) 3 I T C 421
(12) 2 I T C 61

of their realizations in suspense—as indeed they have done in their ac counts—and that it is only when finally the same is given to the share holders that the final impress of profit is so to speak, stamped upon it, and that therefore for the purposes of the Act that is the time at which it is earned [13]

The above was followed by the Patna High Court in the case of *Maharajadhiraj of Darbhanga* [13 a]

Per *Lord Wrenbury (Privy Council)* — The words arising or *accruing occur repeatedly in the Ordinance* coupled with the words and derived from or or derived from Sometimes the expres sion derived from alone is used The respondent contends that the above interest 'accrued to the Company in the year 1921 because it was payable in that year and none the less because it was not paid in that year Their Lordships do not agree The words 'income arising or accruing are not equivalent to the words debts arising or accruing' To give them that meaning is to ignore the word 'income' The words mean money arising or accruing by way of income There must be a coming in to satisfy the word income If the tax payer be the holder of stock of a foreign Government carrying say 5 per cent interest and the Government is that of a defaulting State which does not pay the interest the tax payer has neither received nor has there accrued to him any income in respect of that stock A debt has accrued to him but income has not It does not follow that income is confined to that which the tax payer actually receives Where income tax is deduct ed at the source the tax payer never receives the sum deducted but it accrues to him It is said and truly that a commercial company in pre paring its balance sheet and profit and loss statement does not confine itself to its actual receipts—does not prepare a mere cash account—but values its book debts and its stock in trade and so on and calculates its profits accordingly From the practice of commerce and of accountants and from the necessity of the case that is so But this is far from establish ing that income arises or accrues from (as above instanced) an invest ment which fails to pay the interest due Counsel for the respondent sought to found an argument upon section 11 *and the words* income chargeable with income tax in section 18 No income is chargeable with income tax under the Ordinance It is a person that is chargeable in respect of his income The words income chargeable with income tax mean income in respect of which he is chargeable ' [14]

The above judgment was followed in *Raja Raghunandan Prasad Singh's case*[14 a] by the Patna High Court who saw no ma terial difference in this respect between the Indian Statute and the St Lucia one

(13) Per Lord Dunedin in *Commissioners of Taxes v Melbourne Trust* (1914) A C 1001

(13 a) 4 I T C 283

(14) *St Lucia Usines & Estates v Colonial Treasurer of St Lucia* 4 I T C 112 1924 A C 508

(14 a) 4 I T C 123

Receipts in kind—

In *Scottish and Canadian General Investment Company v Easson*[15] a company held certain mortgage bonds the coupons on which were not paid The debtor company gave place to a new company, and the creditor company surrendered its bonds and received debentures in the new company, a part of which were assumed by the Commissioners to represent interest on the old bonds *Held*, that no objection having been raised before the Commissioners, the Court had no materials on which to question the finding of the Commissioners

the price took the form of fully paid up shares in another company but if there can be no realised profit except when that is paid in cash the shares were realisable and could have been turned into cash Suppose a seller made a profit on a trade transaction but leaves the price in the hands of the buyer at interest That would not affect the claim of the Revenue for the tax payable on the profit —Per Lord Trayner in *Californian Copper Syndicate v Harris*[16]

Where a debt is discharged partly by payment either in kind (money's worth) or in cash and partly by a fresh evidence of debt (pro note), the latter is not 'income' Receiving an I O U is not like receiving a house or jewellery in the former case the debtor's liability still remains while in the latter it does not *Maharajadhiraj of Darbhanga v Commissioner of Income tax*[16 a]

Receipt through agent—

During the War, dividends, etc on shares and securities belonging to a British subject were paid on his account to certain German banks which held the securities, etc *Held* that such dividends accrued or arose when paid to such banks even though not available to the owner, and not when actually received by him after the Peace Treaty[17]

Interest—Added to principal—

If compound interest is payable to a creditor, and the interest is added to the principal periodically no payment being made to the creditor either in cash or by credit in the debtor's accounts, such interest is not taxable[18] This decision was given under the old Act, in which there was no section corresponding to the present section 13 According to the present

(15) 8 Tax Cases 265

(16) 5 Tax Cases 167

(16 a) 4 I T C 283

(17) *Simpson v Executors of Bonner Maurice as Executor of Raj* 45 T L R 371 (C A)

(18) *Board of Revenue v Pydah Venkatachalapathy Garu* 1 I T C 185

Act, the taxability of such interest would depend on how the assessee the creditor, treats it in his accounts It nothing can be deduced clearly from the method of accounting adopted by the assessee, the Income tax Officer is the sole arbiter to decide the question, and no question of law can arise though the assessee can appeal in the usual course against the Income tax Officer's decision A money lender usually finds it convenient to keep accounts on a 'cash' basis and not on the 'mercantile' or 'accrued' basis The mere fact that interest is added to the accounts of the debtors at the end of each year will not in itself make the accounts 'mercantile'[19] The mere conclusion of a contract yields no profit The test is whether interest has become due in such a manner that the creditor can receive it if he desires

If a money lender who keeps his accounts on a cash basis takes a fresh bond from his debtor in lieu of the old one *plus* accrued interest the new bond does not bring any income to the creditor at the time of substitution of the bond *Raja Raghunandan Prasad Singh* v *Commissioner of Income tax*[19-a] Under a mercantile system of accounting, the converse need not necessarily happen For example transactions might be passed through a suspense head before being taken to Profit and Loss Compare the observations in *Commissioners of Taxes* v *Melbourne Trust Ltd*[20]

Interest—When capitalised—

In *Narayanan Chetti* v *Suppayya Chetti*[21] it was held that if money is deposited on the understanding that interest is added on to capital at each 'rest' and the principal *plus* interest treated as a fresh deposit Article 60 (and not Article 63) of the Limitation Act applied to the recovery of the interest *i e* three years from the date of demand—the interest becoming a deposit when *it is added on to capital—and not three years from the date when* interest became due Following the above it was held in *Pethaperumal Chetty's case*[22] and *S L L Lakshmanan Chettyar's case*[23] that interest on deposits of the kind mentioned above should for income tax purposes be treated as having been received and added to the principal The distinguishing feature between these deposits (peculiar among Nattukottai Chetties) and ordinary cases of compound interest is that in the latter the principal continues to be the original sum advanced while in the for

(19) *See* Seth Nanhelal's case 3 I T C 8 and Chettiar's case 3 I T C 321

(19-a) 4 I T C 123

(20) (1914) A C 1001 extracted above

(21) 43 Mad 629

(22) 3 I T C 278

(23) 3 I T C 421

mer the interest is constructively received at each rest and merged in the principal

On the other hand, it was held in the United Kingdom, *In re Craven's Mortgage Davies v. Craven*[24]—an Income tax case—that accumulated interest on a mortgage was taxable in so far as it had not been made capital by contract between the parties

In *In re Morris Mayhew v. Halton*[25]—also an Income tax case—it was held that compound interest with periodical rests, though loosely spoken of as the periodical capitalisation of interest, does not really make the interest capital For the convenience of book keeping the sums accruing as interest periodically may be added to capital, but they are really overdue interest on which further interest is paid and cannot become capital until after the loan account between the creditor and debtor has been adjusted and the creditor has received the interest—either in cash or by adjustment—and actually capitalised it, *e g*, by reinvestment

Doubts were also expressed whether a mere contract between the debtor and creditor to make interest capital would make it such for Income tax purposes

The two United Kingdom rulings referred to above were followed by the Patna High Court in *Raja Raghunandan Prasad Singh's case*[25 a]

In allocating payments as between Capital and Interest, regard should be had not only to the method of book keeping adopted by the assessee, but also to the provisions of sections 59—61 of the Indian Contract Act and the rulings thereunder

In the absence of evidence to the contrary, it may be assumed that a creditor would appropriate receipts first to interest and then only to principal

If the creditor can show that in spite of a large balance being legally recoverable it had been necessary to close the account and the account had in fact been closed, he might reasonably claim to balance the total receipts first against capital and the remainder only against interest"[26]

Mortgagee—Decree-holder—Purchase by—Interest—Adjustment of—

When a mortgagee who is a decree holder buys the property, there are really two separate transactions, *viz*, the purchase of the property and the repayment of the debt He cannot therefore claim that he has not received any interest and that

(24) (1907) 2 Ch 448
(25) (1921) 1 Ch 172 (1922) 1 Ch 126 (C of A)
(25 a) 4 I T C 123
(26) *Maharajadhiraj of Darbhanga v Commissioner of Income tax*, 4 I T C 283

all that he has received is the property, *i e*, capital[27] The purchase price of the property should be apportioned between principal and interest The priority of allocation is in favour of interest[28]

Without discussing the general law of appropriation as between capital and interest, the Patna High Court held in the case of *Raja Raghunandan Prasad Singh* that in the circumstances of that case repayments should be appropriated towards capital first The taxable profit was the difference between the amounts realised and the amount advanced, and if any further sum were realised, they would be taxable in full

Where the profits or gains arising from the buying in of mortgaged property are taxable, do the profits accrue or arise on the date of decree, the date of sale, the date of confirmation of sale or the date of delivery of possession? The answer is the date on which the sale becomes absolute Wort, J, however, considered that it was not a question of law at all, that the question when the income accrued depended on the method of accounting, *i e*, when the assessee shows it as profits in his accounts for other purposes, and that in the particular case the Income-tax Department were justified in not treating the particular transaction as complete until there was no possibility of the sale being set aside[29]

If *A* owes *B* a sum of money and makes it a charge on certain real property which is eventually sold to *B*, *B* receives payment of the debt only at the time of sale (the date on which the sale became absolute according to the ruling in 4 I T C 123) and not at the time of mortgage[30]

Money-lending—Interest from—When accrues—

'But section 13 relates only to the method in which the income, profits and gains are to be computed and has nothing to do with the question referred to us, which is whether interest due but not received is taxable or not The matter now in dispute was decided by the Madras Court in *Board of Revenue v Arunachalam Chetti*[31] where it was held that interest due but not received, was not income.

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(27) *Raja Raghunandan Prasad Singh and another v Commissioner of Income tax* 4 I T C 123 following *Scottish and Canadian General Investment Co v Easson* 8 Tax Cases 265 and *Californian Copper Syndicate v Harris*, 5 Tax Cases 167

(28) *Venkatadri Appa Rao v Parthasarathi Appa Rao*, 44 Mad 570 (P C)

(29) *Raja Raghunandan Prasad Singh and another v Commissioner of Income tax*, 4 I T C 123

(30) *Muhammad Yakub Khan and Muhammad Aslam Khan v Commissioner of Income tax*, 3 I T C 308

(31) 44 Mad 65 1 I T C 75

I am clearly of opinion that a sum of money cannot be recognised as income profits or gains before it has been received [3]

It is submitted with respect that, while, consistently with section 13, income may in certain cases be taxable only when it is received (because the method of accounting of the assessee necessitates such a result), it is not correct to say that in no case can a sum of money be taxed before it has been received That would be to make section 13 a dead letter, and restore the law as it was before that section was introduced *Arunachallam Chetti's* case was decided under the 1918 Act in which there was no section corresponding to the present section 13

Interest—Payment—When to be charged—

In order to claim an allowance in respect of interest paid on borrowed capital, it must be interest paid during the year of account—either in cash or by adjustment The real criterion in determining when the interest is paid depends not so much on the formal method of book keeping adopted by the assessee as on the arrangements for payment of interest between the assessee and his creditor *Held* accordingly in the case of a loan in which at the end of each rest the income became merged in the capital that the interest was paid at the end of each rest [33]

Bad debts—When to be written off—Onus of proof—

I am of opinion that the Income tax Officer must be the judge of the question whether or not a debt became irrecoverable in the year in which the assessee wrote it off and that the matter is not one which depends on the choice of the assessee [4]

Applying the principle of this authority (*In re Bishnu Priya Chaudhurani*[34]) when the assessees stated that the debt became irrecoverable in 1922 and not in any prior date and the Income tax Officer disbelieved them the onus of proving that the debt had become irrecoverable in 1918 and not in 1922 was upon him and not upon the assessees to prove the reverse [3]

(The authority referred to is of doubtful weight—see notes under section 23)

It lies upon the assessee to prove by evidence to the satisfaction of the Income tax Officer that the debt became irrecoverable in the particular year in which the deduction is claimed before making

(32) Per Martineau J *Puran Mal* v *Commissioner of Income tax* 2 I T C 236

(33) *J P Pethaperumal Chetti* v *Commissioner of Income tax Madras* 3 I T C 278

(34) 50 Cal 907

(35) *Per* Moti Sagar J *Puran Mal* v *Commissioner of Income tax Punjab* 2 I T C 236

up his mind finally on the point in issue, the Income tax Officer will give to the assessee an opportunity to establish by evidence the time when the loan in question became irrecoverable '[36]

There is no arbitrary discretion vested either in the assessee or in the Income tax authorities to decide when a bad debt should be written off The question is one of fact to be decided with reference to the circumstances of each case, and it is for the assessee to establish the facts by evidence *Vallabhdas Murlidhar v Commissioner of Income tax, Bombay*[37]

The Judicial Commissioners, Nagpur, however held in *Sir S M Chitnavis v Commissioner of Income tax*[38] that that it is entirely for the assessee to decide when a debt should be written off as bad

A debt should be treated as bad in the year in which it was, in truth, bad, the test being not when the knowledge of the badness comes to light, but when the badness arises But it is more a question of commercial practice than one of law [39] If the real facts were not known at the time the badness arose, the position becomes one of difficulty, and such cases would have to be settled according to "equity and good conscience" See, however, the *Gleaner case*, infra

Suspense accounts—Bad debts—Interest on—

If an assessee keeps a regular suspense account for interest on bad or doubtful debts, and if there is no reason to suspect the *bona fide* nature of the accounts, interest accruing on these debts would not be taxable profits till it was actually realised or otherwise adjusted When, however, the bad debts are realised, the interest would automatically go into the profits as *ex hypothesi* the accounts are maintained on the commercial or mercantile system

Bad debts—Deductibility of—

In *Lawless v Sullivan*[40] (a case from New Brunswick, the law of which Colony did not make any specific provisions, one way or the other, regarding bad debts in computing taxable profits), it was argued that bad debts should never be taken as reducing profits but as loss of capital only This view was not supported by the Privy Council

(36) *Per* Raoof, J *Puran Mal v Commissioner of Income tax Punjab* 3 I T C 236

(37) I L R 54 Bom 430

(38) 3 I T C 321

(39) *Fassett and Johnson, Ltd v Commissioners of Inland Revenue* 4 A T C 89

(40) (1881) 6 A C 373

In a case from Jamaica, the Income tax Act of which contained a provision to the effect that—

"No deduction in respect of (l) any debts except bad debts proved to be such to the satisfaction of the Assessment Committee and doubtful debts to the extent that they are respectively estimated by the Assessment Committee to be bad In the case of bankruptcy or insolvency of a debtor the amount which may reasonably be expected to be received on any such debt shall be deemed to be the value thereof —

it was held by the Privy Council that no deduction could be allowed in respect of a debt found to be bad in the year of assessment but incurred in a previous year

There must in every profit and loss account be an examination of the debts and a careful distinction between those that are good doubtful and bad Sir George Jessel M R said in *In re Frank Mills Mining Co*[41 42] in reference to business accounts You cannot properly put down a single debt as an asset without some consideration of the circumstances of the debtor This estimate should be made in every year of trading and when it has been fixed the annual profits for that particular year are ascertained It may well be that for purposes of prudence all the income so earned could not be wisely taken out of the business and enjoyed for the estimates may b falsified by subsequent events If in any year a loss falls upon a business owing to the fact that debts which in former profit and loss accounts had been regarded as good had become in the interval irrecoverable and bad this incident would mean that the former profit and loss accounts had in that event been inaccurately estimated and that the moneys taken from the business on the assumption that the estimates were good had been drawn in excess of what the actual facts show on the true position was permissible It is in their Lordships opinion to determine under these considerations what allowances should be made that section 10 (the section quoted above) is directed It provides in the first place that in making up the *account there cannot be deduction for any debts This can only mean* that the trader is not at liberty to limit the income which he returns to the amount actually received but must estimate the value of the debts that have accrued to him in the year s trading But the provision that so excludes him provides also that there should be exempted from this exclusion bad debts proved to be such this exception must apply to the general provision as to the debts and as the debts which may not be deducted are debts that have accrued due to the tax payer in *the year s trading but have not been received* so the exception is out of this amount Bad and doubtful debts are consequently bad or doubtful debts arising out of the year s trading ascertained and determined to be bad or doubtful during that year The contrary decision would involve the introduction into the clause of the statement that bad debts are to be deducted only in the year in which they are found to be bad and yet apart from bankruptcy or the disappearance of a cre

(41 42) (1883) 23 Ch D 52

ditor (debtor?) it might be very difficult to ascertain the moment when this event was definitely determined The reference to bankruptcy appears to strengthen the opinion for it shows that the actual value of the debt does not want to be measured by determining the exact sum that is in fact received in liquidation but is to be the sum that it is reasonably expected might be received Where the appellant s contention correct the actual sums received ought to be the amount included in the assessment in the year of receipt

Their Lordships have been referred to the practice of the Inland Revenue authorities in this country under similar provisions Their Lordships are unable to attach any weight to this practice It may be due to a misunderstanding of the statute or it may be that if all the provisions of the various English Income tax Acts were examined they might bear a different interpretation to those that are now before their Lordships or again the convenience of administration may have suggested this form of relief '[43]

Reserves—Distributed as profits—

In 1918, the assessee, a company, set aside Rs 1,00,000 in its accounts as a Reserve for bad and doubtful debts, in 1922, the Reserve was distributed as profit The Company contended that the sum in question was profit of the year 1918, and that, having escaped assessment then was, under section *34*, not liable to tax in 1922, more than one year having elapsed *Held*, that the sum was liable to tax

At the end of any given year of any Company s working unless the business has been wound up there must always be certain items in suspense—items of cash which are not yet due to the company or which have not yet been recovered At the end of the year some of those items may be regarded by the company as good some as bad some as doubtful and if the company places on the debit side a certain sum to meet the contingency that some of these debts will prove irrecoverable that sum is not a profit but a liability and the amount of profits arrived at after deduction of that sum is reduced by that very amount In fact the sum of Rs 1 00 000 in question though part of the income in 1918 was not profit it was not shown as profit in the accounts, it was not treated as profit by the company and it did not really become profit until the doubtful debts against which it was set were recovered It was not treated as profit nor did it become real profit until 1922 when it was incorporated as such in the company's accounts When a business is a cash business and accounting is not kept in the mercantile fashion no provision is made for bad debts but when the mercantile system of accountancy is followed provision is invariably made for bad and doubtful debts [44]

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(43) Cramer Co v Assessment Committee (1922) A C 169

(44) In re the Delhi Cloth and General Mills Co, Ltd (unreported)

Against the above decision the assessee applied for leave to appeal to the Privy Council but was refused such leave.[45]

Double taxation of same sums—

If a person has been taxed in one year in respect of book debts owing to him, he cannot again be taxed on the same sums of money when the debts are received in cash in a later year. A man cannot be taxed twice in respect of the same sum[46] The assessee is entitled to show that the income, etc, included in the later assessment was included in the earlier one, and it is a question of fact to be decided on the evidence whether it was so included The Income-tax authorities must apply their minds to the materials placed before them, and it is not open to them to argue *a priori* that there can be no double assessment because the earlier assessment was made on a mere estimate[47]

Applies only to assessments under section 23 (3)—

This section applies, strictly speaking, only to assessments made under section 23 (3) If the return of the assessee is accepted, and the assessment made under section 23 (1), section 13 hardly applies Nor will the section apply if the assessee is in default, and as a consequence assessed under section 23 (4), inasmuch as the Income tax Officer is not bound to follow section 13 There is nothing, however, to prevent the Income tax Officer following section 13 in such cases, if he has access to the assessee's accounts It is only, therefore, in cases under section 23 (3), *i e*, when the assessee files a return, and the return is questioned by the Income tax Officer, that the necessity for applying section 13 will arise

Flat rate of profits—Estimate of—

It is under this section that assessments are made on an assumed flat rate of profits on the turnover Such a flat assessment can be made only if the accounts kept by the assessee are such that the profits cannot be easily deduced therefrom The basis is obviously the previous practice and experience of the Department in regard to similar trades[48] The flat rate which is assumed as the basis of profits does not raise any question of law[49] There is nothing to prevent an Income tax Officer

(45) *Delhi Cloth and General Mills Co Ltd* v *Commissioner of Income tax*, 2 I T C 439

(46) *Commissioner of Income tax* v *Sarvarayadu* 2 I T C 208

(47) *Commissioner of Income tax, Burma* v *C T V S Chettiyar Firm*, 4 I T C 160

(48) *Pannalal* v *Commissioner of Income tax*, 2 I T C 432

(49) *Ferozeshah* v *Commissioner of Income tax, Punjab*

charging two different flat rates for two different assessees in the same locality No question of law is involved in this[50]

Return—Non acceptance of—Notice to assessee—

While under section 13 it is open to the Income tax Officer to compute the income on such basis as he may decide if the method of accounting adopted by the assessee is irregular or such that income cannot be properly deduced from the accounts, this section does not entitle the Income tax Officer to dispense with a notice under section 23 (2) if he deos not accept the return filed by the assessee[50a] That is to say, if the income is calculated by the Income tax Officer from the accounts [produced under section 22 (4)] or any other evidence differs from that given in the return filed by the assessee, the Income tax Officer should give the assessee an opportunity of explaining the return and producing the evidence in support of it, even though, in the end, the Income tax Officer has to work out the income, on his own basis, from the accounts produced or the other evidence The notice under section 23 (2) is not bound to disclose on what basis the Income tax Officer proposes to make the assessment Section 13 does not justify a 'bald' estimate of income by the Income tax Officer without any reasons for arriving at the figure The Income tax Officer is not entitled to make a guess without any evidence[1] It is the duty of the assessee to present accounts showing his true income and if he fails to do so, and the Income tax Officer makes an estimate to the best of his ability on the materials before him, the assessee must put up with it[2] The Income tax Officer however must be consistent and logical, and must not act arbitrarily even if he has only to make an estimate He must not, for example, accept only certain entries as correct and reject others as incorrect without giving reasons for his conclusion[3] In no case may an Income tax Officer reject genuine accounts on the ground that they are complicated,[1] nor on the ground that balances have not been struck[4]

The proviso applies only when no method of accounting has been regularly employed, or when the method is such that in the opinion of the Income tax Officer the income cannot pro

(50) See *Dayaram Sobharam v Commissioner of Income tax*, 2 I T C 26.

(50a) *Rampratap Sukhdial v Commissioner of Income tax, Delhi* 3 I T C 362

(1) See *Dhunichand Dhaniram v Commissioner of Income tax* 2 I T C 153.

(2) *Maharajadhiraj of Dharbhanga v Commissioner of Income tax*, 4 I T C 253

(3) *Shiva Prasad Gupta v Commissioner of Income tax (U P)*, 3 I T C 406

(4) *Raghunath Mahadeo v Commissioner of Income tax Bihar and Orissa*, 2 I T C 302.

perly be deduced therefrom In a case therefore in which the Income tax Officer said nothing in his assessment order about the method of accounting employed by the assessee, but merely expressed a doubt, for which he gave no reasons, as to the genuineness of the accounts, it was held that a notice under section 23 (2) was necessary if the Income tax Officer did not accept the return, and that in the absence of such a notice, the assessment was illegal [5]

If the assessee's accounts are found to be not genuine there is no obligation either under the law or in ordinary fairness to inform the assessee of the basis on which the Income tax Officer proposes to make an estimate of income, etc Even if the materials before him are insufficient, the Income tax Officer must somehow make an assessment to the best of his ability The Court suggested however that if the accounts are not found to be false, the Income tax Officer should inform the assessee of the defects in the accounts, though the Act does not place this obligation on the Income tax Officer [6]

Unintelligible accounts—

While the Commissioners are not, as a rule, entitled to insist on the certification by a professional accountant of the accounts produced before them, it was held by Rowlatt, J in a case in which the accounts were voluminous, kept in shorthand and not easily intelligible, that the Commissioners were justified in refusing to look at the books until the assessee had the accounts prepared by a professional accountant [7 8] This view was affirmed by the Court of Appeal in *Wall* v *Cooper* [9] The accounts are not bound to be accepted by the Commissioners irrespective of their unintelligibility, and if the Commissioners are unable to accept the books as they stand, they may ask for the production of certified accounts by professional accountants If the assessee fails to comply with the wishes of the Commissioners he cannot afterwards complain against a random assessment

Income-tax Officer—Sole Judge—Possibility of deducing profits from accounts—

"We think it was clearly intended by the proviso to section 13 of the Act that the Income tax Officer should be the sole arbiter on the ques-

(5) See *Kesri Das & Sons* v *Commissioner of Income tax Lahore* 7 Lah 138 2 I T C 213

(6) *Chan Lo Chwan and Tong Hock Hin* v *Commissioner of Income tax, Burma*, 3 I T C 397

(7 8) *Hunt* v *Jolly* 14 Tax Cases 165

(9) 8 A T C 240

tion of the possibility of deducing the income profits and gains from the method of accounting employed "[10]

An inference that the books of account produced are not complete because of the non production of certain books called for coupled with certain other facts is a question of fact[11]

Whether the profits can be ascertained with any approach to accuracy from the books or not is a question of fact[12] Similarly what exactly is the system of accountancy followed by the assessee is a question of fact and unless an Income tax Officer exercises his discretion capriciously or unjustly, no question of law can arise in regard to such matters[13]

When an assessee has omitted from his return large amounts which are taxable, the Income tax Officer is entitled to assume that there are other similar amounts omitted but not discovered and make a reasonable addition to the estimated assessable income. No question of law will arise[14]

Methods of accounting—Power of Income-tax Officer to alter—

The Judicial Commissioners of Nagpur have suggested in *Bansilal Abirchand v Commissioner of Income tax*[15] that under the proviso to this section, if the Income tax Officer considers the system of accounting of the assessee to be unsuitable or improper, he can issue specific orders asking the assessee to change his method of accounting, but until he has done so, the system of accounting adopted by the assessee should be accepted by the Income tax officer It is submitted with respect that it is entirely for the assessee to decide in what manner he shall keep his accounts, and that the Income tax Officer has no power to direct him to keep accounts in a particular form The Income tax Officer's duty is to compute the profits in accordance with the method of accounting regularly employed by the assessee, or, if no method of accounting has been regularly employed or if the method employed is such that in the opinion of the Income tax Officer the income, profits and gains cannot properly be deduced therefrom, in such manner, *i e*, on as equitable a basis as possible, as he may determine What the Court apparently intended is that, having accepted an assessee's method of book keeping as reflect

(10) *Cokaldas and Jagannath v Commissioner of Income tax Lahore*, 2 I T C 180

(11) *Commissioner of Income tax Burma v E M Chettyar Firm* 4 I T C 111

(12) *James Cycle Co v Commissioners of Inland Revenue* 12 Tax Cases 93 (C of A) *Maharajadhiraj of Darbhanga v Commissioner of Income tax* 4 I T C 283, In re *Radheylal Balmukund* (Calcutta High Court)

(13) *Ferozsalah v Commissioner of Income tax Punjab*

(14) *Sir Harisingh Gour v Commissioner of Income tax, Central Provinces* 3 I T C 350

(15) 3 I T C 57

ing his true profits, the Department cannot go back on it without giving the assessee a chance to rearrange his book keeping.

Method of accounting—Varying—

It is not open to an assessee who maintains accounts on the "earned" basis to claim that a particular item or items should be worked out on a "receipt" basis No question of law arises in such a case and the Income tax Officer has absolute discretion as to the method of computing profits[15a]

Estimated losses—Not permissible—

Only actual, *i e*, realised losses during the accounting period, and not estimated losses, may be taken into account in arriving at the profits See *Collins & Sons v Commissioner of Inland Revenue*,[16] *Whimster & Company v Commissioner of Inland Revenue*,[17] *J H Young & Company v Commissioner of Income tax*,[17a] (Excess Profits Duty cases) set out under section 10

An anticipated liability is not an ascertained debt and therefore not a proper debit in the accounts Thus when a company received a claim against them for demurrage which was not at any state accepted by them and was eventually withdrawn it was held in an Excess Profits Duty case that the claim could not be debited against the Profit and Loss account as the withdrawal of the claim was not the giving up of an ascertained debt[18]

The accounts of a colliery company were made up to 30th June From April to July, there had been a coal strike involving cessation of work Substantial expenditure on repairs and reconditioning had become necessary as a consequence of such cessation, and the expenditure was incurred after July, though it was known in June when the accounts were closed that such expenditure was necessary Provision was made out of the profits of the period ending 30th June in order to meet this expenditure later on, and it was held by the House of Lords that this provision could not be deducted from the profits of the period ending 30th June for Excess Profits Duty purposes[19]

Per *Lord Sumner* —' It seems to me like saying that a man is entitled to charge for supper in his expenses for Sunday night because, though he went supperless to bed he orders something extra for his breakfast on Monday morning (*ibid*)

(15 *a*) *T O Foster v Commissioner of Income tax Burma* 3 I T C 435

(16) 12 Tax Cases 773

(17) 12 Tax Cases 813

(17 *a*) 12 Tax Cases 827

(18) *Ford & Co v Commissioners of Inland Revenue* 12 Tax Cases 997

(19) *Glamorgan Colliery Co v Commissioners of Inland Revenue*, 7 A T C 48.

Method of converting the net profits of sterling Companies into rupees for the purposes of income tax—

Where the business of a sterling company is transacted entirely in India there is no need for the Income tax Officer to look at the sterling accounts as he can get a record and ask for a return of the transaction in rupees He should act in the same way in cases where the profits of the Indian branch of a company operating in other countries can be separately ascertained In the case of a company operating through local branches in different countries where the profits of the Indian branches cannot be ascertained separately but have to be deduced from the total sterling profits of the company from all its operations the net profits of the company for the purposes of assessment to Indian income tax should be converted into rupees at the rate of exchange ruling on the last day of the year to which the account relates unless the Income tax Officer is able by an examination of the accounts to ascertain the average rate of remittances throughout the year and to deduce from that the rupee figure of profits (*Income tax Manual* para 50)

Exemptions of a general nature

14 (1) The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family

(2) The tax shall not be payable by an assessee in respect of—

(*a*) any sum which he receives by way of dividend as a shareholder in a company where the profits or gains of the company have been assessed to income-tax or

(*b*) such an amount of the profits or gains of any firm which have been assessed to income-tax as is proportionate to his share in the firm at the time of such assessment or

(*c*) any sum which he receives as his share of the profits or gains of an association of individuals, other than a Hindu undivided family, company or firm, when such profits or gains have been assessed to income tax

History—

Section 5 (1) (*f*) of the 1886 Act was as below —"Nothing shall render liable to the tax any income which a person enjoys as a member of a company or of a firm or a Hindu undivided family where the company or the firm of the family is liable to the tax"

As the Schedules in that Act were, so to speak, water-tight, such income was neither taxed nor taken into account in fixing the rate of tax of the assessee

In the 1918 Act, all these items were excluded in computing the taxable income of the assessee [see section 12 (1)], but they were taken into account in fixing his 'total income,' i e, the rate of tax (section 13)

In the present Act, two changes were made in 1922 —

(1) Income from a Hindu undivided family was excluded from 'total income', i e the position before 1918 restored

(2) The words "is liable to the tax" were changed to "have been assessed to tax" This ensures that the tax has been or will be actually levied, and thus safeguards the interests of the Crown

The words "at the time of such assessment" were added by section 3 of Act III of 1928 The words were inserted in order to clarity the meaning See notes under section 26 The insertion of these words however produced an unintended hardship in the case of partners of firms discontinuing business, etc See section 25 To remove this hardship a Notification has been issued under section 60—No 21, dated 12-10 '29, set out under that section

Clause (*c*) of sub section (2) was inserted by Act XXII of 1930 It supplies an unintended omission and places members of associations of individuals not being a firm or company or a Hindu undivided family roughly in the same position as partners in unregistered firms

References—

As to what is a Hindu undivided family, see section 2 (9), as to a Company, see section 2 (6), and as to a firm, see section 2 (6 A), (14) and (16)

Taxable income—

The Act of 1918 (section 12) had a special definition of "taxable income" The expression meant the income assessed directly on the assessee, that is, his income from sources other than the dividends of a company or share in the profits of a firm, or of a Hindu undivided family so that an assessee who had income either from a Hindu joint family or a firm or from a company, and had in addition other income which was assessed to income tax directly on him, paid no income tax on that other income unless it was in excess of Rs 2,000, while *per contra* he got no deduction on account of insurance premia set against the

income that he derived from a company or firm Sections 2 (15), 3 and 14 to 16 of the present Act (read with the Finance Act) provided that the "total income" of an assessee shall determine his liability to the tax as well as the rate at which the tax shall be assessed on every portion of that income, and also permit the deduction on account of insurance premia in the case of all income taxed from whatever source derived

Under section 14 of the Act of 1918, it was the aggregate amount chargeable under each head that determined the "taxable income", so that, where a person carried on a trade or profession, and also had income from house property, if he had actually incurred a loss in the trade, the figure adopted under that head, in arriving at the aggregate amount of income chargeable to income tax, was nil, and not a minus sum Section 24 of the present Act makes provision for the setting off of a loss under one head of income against profits under another But the allowances made in respect of house property are restricted to the annual value of income from property, which therefore, can never be a minus sum The income from salaries or securities also cannot be a minus sum

Hindu Undivided Family—Taxation of—

For a history, see notes under section 2 (*a*) A Hindu undivided family is now taxed like an individual at a graded scale, according to its total income, and no account is taken of how that income is distributed amongst the individual members, when such individual members are assessed to income tax or super tax in respect of their separate income This applies even in cases where the amount of the income of the Hindu undivided family is less than Rs 2,000, and is, therefore, not liable to taxation in the hands of the manager of the family The same remarks apply to super tax The taxation of the income of a Hindu undivided family thus differs from the taxation of the income of an unregistered firm since, where the profits of an unregistered firm are not liable to taxation in the hands of the firm, such profits are taxed in the hands of the individual partners, both for the purposes of income tax [section 14 (2) (*b*) and section 16 (1)] and of super tax (section 55 proviso), and where the profits are taxed in the hands of the unregistered firm, the share of such profits of each partner is included in his 'total income' for the purpose of determining the rate at which he shall pay income tax on his other income [section 16 (1)] It will be noticed that section 14 (1) applies both to income tax and super tax, whereas 14 (2) applies to income tax only—see section 58

Assessed to tax—

Sub section 2 (a)—It is not necessary that any tax should be payable by the company What is necessary is that it should have been assessed Even if the company is not liable to pay tax, it may be in a position to declare dividends out of reserves, i e profits taxed in previous years, and the shareholders cannot be called on to pay tax on such dividends

Sub section 2 (b)—This sub section makes no difference between partners of registered firms and those of unregistered firms

Taxation of firms—

While income tax is leviable on the profits of a registered firm at the maximum rate (see Finance Act) and while under section 48 (2) a member of a registered firm is entitled to get a refund in cases where the maximum rate is greater than the rate applicable to his total income, it is desirable that so far as possible such refunds should be avoided Where therefore the individual partners in a registered firm file their returns of personal income at the same time as the return of the income of the firm the Income tax Officer on being satisfied that the whole of the profits of the registered firm are accounted for in these personal statements should charge the partners direct at the rate appropriate to their total income The liability of the registered firm for the tax assessed upon the profits of the firm will however remain unless and until the tax assessed upon the individual partners has been recovered from them

In computing the total income of a member of a registered firm or unregistered firm for the purposes of income tax or super tax there should be included in that total income such an amount of the profits or gains of the firm as is proportionate to his share in the firm This particular phraseology has been adopted in section 14 (2) (*b*) and in the proviso to section 55 in order to make it clear that it is the proportionate share of a partner in the whole of the assessable profits of a firm that is to be taken into account in determining his total income and not merely the amount that he removes from the possession of the firm Some partnership deeds for example provide that the partners cannot remove more than a certain proportion of the profits in any year or again that a certain proportion of the profits must be distributed in charity It is now made clear in the Act that it is the whole of his proportionate share in the total assessable profits of the firm that is to be taken into account and that that proportionate share cannot be reduced by any consideration of how those profits are utilised (*Income tax Manual* para 55)

See also notes under section 2 (14)

Taxation at the source is more a liability than a right, and it is not open to a partner to claim that he should not be taxed directly on his share of the profits of the firm[19a] See also notes under section 34

(19 a) In re *Neelkhant Doga* (Calcutta High Court) unreported

Associations of individuals not being a firm, company or Hindu undivided family—

Till 1930, the profits and gains of such associations were liable to be taxed twice once in the hands of the association and again in those of the members. Clause (*c*) of sub-section (2) removes this hardship. It should be noticed however that while under clause (*b*) read with section 16 the proportionate share of profits at the time of assessment is included in the total income of a partner of a firm, only the actual amount received as a member of an association, not being a firm, etc., is so included under clause (*c*) read with section 16.

Profits or gains—

These words are not used in this section as excluding '*income' i.e., from securities* or house property or from other sources—which may enter into the profits or gains of a company, firm or association.

Dividend—

"The word carries no spell with it. Applicable to various subjects, it is not intelligible without knowing the matter to which it is meant as referring"—but its ordinary meaning is share of profits.[20] A preference dividend is substantially interest, all the more so if it is cumulative (*ibid.*—see Stroud).

But the Indian Income-tax Act makes no distinction between preference dividends and other dividends.

Shareholder—

Includes both preference and ordinary as well as deferred shareholders. There is no definition of a shareholder in the Indian Companies Act, but the definition of a 'share' is as below:—

Section 2 (16).—"Share means share in the share capital of the company, and includes stock except when a distinction between stock and shares is expressed or implied.

Stock—

"The difference between stock and shares is that shares are not necessarily paid up whereas stock can exist only in the paid up state, and that shares cannot be bought or sold in fractions whereas the consolidated stock of a company can be split up into as many portions as one likes and bought or sold in such fractions. Otherwise stock is just like shares; it is in fact simply a set of shares put together in a bundle."[21]

Partner's salaries—

If a partner in a registered firm draws salary from the firm, 'his share' ordinarily means his share of profits plus salary. *See* notes under section 10 (2) (*iii*) and (*ix*).

(20) *Henry* v. *G N. Railway*, 27 L. J. Ch. 1.
(21) Per *Lord Hatherley*, in *Horrice* v. *Aylmer*, (1875) 7 H. L 717.

Allowances—Hindu undivided family—

The object of this section is to exempt from taxation, in the hands of an individual, that which has already been taxed in the hands of the joint family as such. It, however, the individual receives an income *aliunde* from property which has not been taxed as that of a Hindu joint family, then the provisions of this section have no application. Accordingly, in a case in which a person received an allowance from his son out of a property which the latter had inherited from his maternal grand father, it was *held*, that the allowance received by the father was not exempt from income tax. The allowance, of course, was gratuitous and the father was not legally or otherwise entitled to it by reason of his being a member of the joint family.[22]

Firms—

In the United Kingdom, firms are not charged with super-tax (*see* section 4 of the English Act). Under Rule 10, Cases I and II of Schedule D, the partnership is taxed jointly and in one sum, and under sections 14 (3) (*c*) and 20, the individual partners can get relief based on the proportion according to their shares of the joint income of the partnership.

Company—Whether agent of shareholder—

Both in India and in England, it is the company, by its proper officer, that has to make the return of the profits of the company. It is the company which is assessed on these profits, and is obliged to pay, and actually pays, on these profits. What the shareholder gets is the balance of the profits after the tax has been paid by the company. But in the United Kingdom there is an express provision authorizing the company at its option to deduct tax from dividends paid (Rule 20, General Rules). There is no clear provision corresponding to section 14 of the Indian Act exempting the dividend from further taxation in the hands of the shareholder.

In the *Ashton Gas Company Case*[23] in which the question was whether a maximum rate of dividend which had been fixed by the Articles, involved the inclusion of tax or its exclusion, and the question of agency between the company and the shareholder was raised only incidentally, it was argued for the company that a company is taxed in its own person and not as agent for share holder. Therefore, the tax is a charge on the profits, before the time comes for distribution to shareholders. Hence income tax

(22) *Ambica Prasad Singh* v *Commissioner of Income tax* 2 I T C 92, 5 *Patna* 20

(23) (1906) A C 10

should be deducted before profits are distributed Incidentally, however, the theory of 'agency' was formulated

Per *Buckley, J* —"The profits are not arrived at after deducting income tax The income tax is part of the profits, *viz*, such part as the Revenue is entitled to take out of the profits A sum which is an expense which must be borne, whether profits are earned or not, may no doubt be deducted before arriving at profit But a proportionate part of the profits payable to the Revenue is not a deduction before arriving at but a part of, the profits themselves "

But Per *L J Romer* —' if the profits, after deducting the income tax have subsequently to be distributed amongst the members of the company, that income tax is not again payable by the members so far as they receive their share of the profits because the income tax is to be taken as having been paid out of their profits and on their behalf Out of these profits, income tax would have *been payable directly by the shareholders* if it had not been paid by the Company As a matter of fact, it has been paid by the Company and, therefore, in that respect, the shareholders are free from the obligation of paying the income tax because they have already received a portion of their profits by reason of the payment of the income tax in respect of those profits by the Company generally "

Per *Halsbury, L C* —"But there is a somewhat difficult and complex machinery which makes the officers of the company officers of the Finance Department of the Government for the purpose of collecting the tax Well let us suppose that we get rid of the machinery altogethe and that the company are relieved from the necessity of collecting the tax for the Government "

In *Mylam* v *Market Harborough Advertiser Company,*[24] in which the company claimed relief from income tax on the ground that its income did not exceed £160, the minimum taxable limit in England, the judgment incidentally supported this theory of agency Similar views were expressed by Swinfen Eady and Scrutton, L JJ, in *Brooks* v *Commissioners of Inland Revenue*[25] In *Purdie* v *Rex,*[26] however, in which a married woman living with her husband, who earned some dividends from companies, claimed a refund of the tax paid by the companies on the ground that she was not separately chargeable to income tax, Rowlatt, J said as below —

"The company is assessed and pays the tax There is strictly speaking, no tax on dividends at all, the company has to pay income tax on its profits as a company, and having paid the income tax the effect is that there is less to divide among the shareholders Sometimes a company declares what it calls a dividend 'free of income tax', which means that, having paid income tax, the dividend paid is less, because there is less to divide Sometimes it declares a dividend which it

(24) 5 Tax Cases 95
(25) 7 Tax Cases 236
(26) (1914) 3 K B 112

does not call free of income tax, and then it deducts a certain percentage from the dividend, stating that it is for income tax The real effect of the latter course is not that the company has declared a dividend of the full amount and then deducted income tax from it, but that it has declared a dividend of the net amount, and told the shareholders that it would have been so much more for the fact that the profits of the company were charged with income tax before the dividend was made Strictly speaking, therefore the suppliant has not been charged with income tax at all in respect of her dividends.

But this reasoning of Rowlatt, J's was questioned in *Brooke v Commissioners of Inland Revenue* as being inconsistent with the decision in the *Ashton Gas Company* case cited above *See* the judgments of Atkin, J and Scrutton, L J

The question was again discussed in *Scottish Union and National Insurance Company v New Zealand and Australian Company* in which case it was held that preference shareholders have no claim to relief from Double Income tax Relief granted to a company [28]

Per *Viscount Haldane* — No doubt the respondent company paid Income tax on the profits out of the residue of which the preference dividends have been paid But that did not diminish the income of the appellants They neither paid the tax themselves nor were indirectly subscribers to it in any way It is the ordinary share holders alone who have lost by it, I think that as against the ordinary share holders, the appellants (preference shareholders) have no title '

Per *Viscount Finlay* — The sums repaid by the Commissioners go into the assets of the company and will fall into the dividend payable to the ordinary shareholders whose dividends would otherwise have been diminished by the whole amount of the disbursements for the colonial income tax

Per *Viscount Cave* — The purpose is to give some relief to the tax payer who has paid both British and Colonial income tax on the same income Here the double tax has been paid by the ordinary share holders, and no part of it has fallen on the preference shareholders

Per *Lord Shaw of Dunfermline* — (To argue) that the payment of Income tax made by the company in the Colonies was a payment made on behalf of individual shareholders and as their agent is totally inadmissible In the same sense it might be said that each individual shareholder was the principal in a transaction of paying the salary of every colonial servant of the company and that the company itself in its corporate capacity was the mere agent or hand of the individual share holder It is further totally inadmissible to say that the individual shareholder has a right to an aliquot portion of the profits earned upon

(27) 7 Tax Cases 261

(28) 1 A C (1921) p 1 2 *Rover v South African Breweries* (1918) 2 Ch 233 was overruled

the transactions in the Colonies etc Once the Company has been granted relief, the relief against double payment becomes completely operative The taxing authority has made the proper allowance After that the whole question is not one for the taxing authority, but is one *inter locios*, that is to say, is one of distribution among the shareholders That distribution is governed by the Articles of Association of the Company"

The particular decision in this case as to the claim to Double Income tax Relief is obsolete in view of S 27 (5) of the British Finance Act of 1920, but the general principles as to 'agency' formulated by the House of Lords are unaffected

See also In re *Cains Settlement*,[29] Rowlatt, J 's view in *Purdie* v *Rex* has been followed in *Blott's case* (8 Tax Cases 101) which went up to the House of Lords In that case the question arose, in another connection, *viz*, how far bonus shares are income The right of a shareholder to obtain a dividend had also to be discussed, which necessarily involved an examination of the general relationship between a company and the shareholder

Per *Rowlatt, J*—"No individual corporator or shareholder, either by the formality of a separate assessment or without such formality can treat himself as having been individually taxed upon a proportion of the total collective gains corresponding to his own interest in the corporate concern and he cannot therefore, get allowed to him by exemption or return the tax paid by the corporation in respect of such proportion There is no special direction for the calculation of the individual income of a corporator or shareholder It is clear however, that it is to be measured by his dividends The only way that he can make the provision for exemption apply to his case is by bringing in his dividends among his particular sources of income' under section 164, and then treating them as diminished by the collective tax in the way already described obtain a refund under section 165 as a person who 'has been charged to and has paid' duty 'by way of deduction from any rent, annuity, or other annual payment'"

Per *Warrington, L J*—"The scheme of the Income tax Acts with regard to companies and their shareholders is that the company is assessed on the total amount of its profits For the purpose of exemption or abatement the claimant is required to make a declaration in the prescribed form of amongst other things, the particular sources from which his income is derived and the particular amount arising from each such source The form is prescribed by Section 190 Schedule (G) Rule XVII The material portion is the second paragraph, *viz*, 'Declaration of the amount of rents, interests annuities, or other annual payments for which the party is liable to allow and deduct the duty'"

Per *Lord Cave*—"Plainly, a company paying income tax on its profits does not pay it as agent for its shareholders It pays as a tax

(29) (1919) 2 Ch. 370

payer, and if no dividend is declared the shareholders have no direct concern in the payment If a dividend is declared, the company is entitled to deduct from such dividend a proportionate part of the amount of the tax previously paid by the company, and, in that case, the payment by the company operates in relief of the shareholder But no agency, properly so called, is involved "[30]

Lord Cave's dictum has been followed in two subsequent cases—See *per* Younger, L J, in *Bradbury* v *English Sewing Cotton Company*,[31] and the same Lord Justice in *Sheldrick* v. *South African Brewery, Ltd*[32]

Per *Rowlatt, J*, in *Ritson* v *Phillips*—"Here is the old fallacy He is not taxed on his dividends The Companies are taxed on their profits, not as his agents (as has been loosely said) though at his ultimate expense There is no provision for the return of any of this tax to the shareholder save in the process of giving effect to deduction and relief "[33]

Company—When agent of shareholder—

All these decisions, however, do not prevent a company, as a corporate entity, from acting as the agent of an individual, who may be a sharholder, and really carrying on his business,[34] but as regards dividends and the tax on them the position is unaffected by such agency so long as the agency is not a 'sham' The company as such, that is, as a separate legal entity, will pay tax on its own profits, and the shareholder will get relief under sections 14 and 48 As regards "bogus" companies and those not distributing profits, *see* notes under sections 2 (6), 3, 23-A and 33 A

Super tax—Paid by company—

"There is nothing in the Act from which it can be inferred that in computing the taxable income of individuals or Hindu undivided families for the purpose of super tax dividends upon which super tax has been paid by the Company should be deducted By section 16 in computing the total income, the dividends payable to an assessee and a share holder in a company are included But although by section 14 where the profits of the Company itself have been assessed to income tax the shareholder is exempt from paying a second income tax upon the amount of dividends received by him and already taxed as the income of the Company no such exemption is provided in the case of super tax On the contrary section 58 which applies the other provisions of the Act, as far as may be to the assessment of super tax expressly excludes the operation

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(30) *Commissioners of Inland Revenue* v *John Blott and B I Greenwood* 8 Tax Cases 136

(31) 8 Tax Cases 481, (1922) 2 K B 569

(32) (1923) 1 K B 191

(33) 9 Tax Cases 10

(34) *Commissioners of Inland Revenue* v *Sansom*, 8 Tax Cases 20

of section 14 It is clear, therefore that the intention of the legislature was to charge super tax upon the income of companies as well as upon the income of individual shareholders including in the income of the latter the dividends received from the Company, although they had already been charged to super tax at the flat rate of 1 anna It was contended that the Company was the agent of the assessee for the purpose of paying tax and that credit should be given for the amount paid by the Company on the dividends received but although this may be true in the case of income tax, it is clear, by the sections already referred to, that super tax must be separately paid on the profits of a Company by the Company itself at the smaller rate and by the shareholder on the dividends received by him out of those profits as part of his income, the rate payable by him being on a sliding scale according to the amount of his total income It follows that no exemption can be claimed by the assessee from the payment of super tax in respect to the dividends received by him [35]

Preference shareholders—Position of—

In *Purushottamdas Harkishandas* v *C I Spinning Company*[36] it was decided that as between preference and ordinary shareholders, the former are not entitled to have their preference dividends paid free of income tax in the absence of express words to that effect in the contract regulating the rights of the parties

Exemption in the case of life insurances

15 (1) The tax shall not be payable by an assessee in respect of any sums paid by him to effect an insurance on his own life or on the life of his wife, or in respect of a contract for a deferred annuity on his own life or on the life of his wife, or as a contribution to any Provident Fund to which the Provident Funds Act, 1897,[37] applies [* * * *][38]

(2) Where the assessee is a Hindu undivided family, there shall be exempted under sub-section (1) any sums paid to effect an insurance on the life of any male member of the family or of the wife of any such member

(35) Per *Dawson Miller, C J*, in *Maharaja of Darbhanga* v *Commissioner of Income tax*, 1 I T C 303, also *D islau* v *Tata Iron and Steel Co* (unreported)

(36) 42 Bom 579, 1 I T C 11

(37) IX of 1897, *see* now Act XIX of 1925

(38) The words "or to any Provident Fund which complies with the provisions of the Provident Insurance Societies Act, 1912 or has been exempted from the provisions of that Act" were omitted by Section 5 of Act XI of 1924.

(3) The aggregate of any sums exempted under this section shall not, together with any sums exempted under the proviso to sub-section (1) of section 7, and any sums exempted under sub-section (1) section 58-F,[39] exceed one-fifth of the total income of the assessee

History—

Prior to 1918, this exemption rested upon a Notification under the 1886 Act

Under the 1918 Act, the one sixth was calculated on the 'chargeable income' and not on the total income

As regards the omission (in 1924) of the reference to funds under the Provident Insurance Societies Act, 1912, *see notes under section 4 (3), (ii)*

Super-tax—No rebate of—

See section 58 which makes section 15 inapplicable to super-tax *No* rebate of super tax *can therefore be claimed on* account of insurance premia, etc

Single premiums—Insurance of husband's life, etc —

The sums paid need not be annual or periodical payments. (In this respect the United Kingdom law was different till recently) A single payment for an insurance policy is eligible for the exemption, but the allowance is subject to the maximum limit of one sixth of the 'total income' The assessee need not be an adult, nor his wife In cases in which the assessee is the wife, no allowance can evidently be claimed on an insurance on the husband's life No allowance can be claimed on insurances on the life of children or other relations, except that in the case of a Hindu undivided family the insurance may be on the life of any male member of the family or of his wife Also, in the case of a Hindu undivided family the insurance need not be on the life of adult male members or of adult wives of members *Quaere*. How should a matriarchal family, as in Malabar, be dealt with?

Exemptions on account of life insurance—

Under the provisions of section 7 (1) proviso and section 15, an abatement of income tax is given, on such portion of an assessee's income as may have been—(i) deducted from his salary, under the authority, and with the permission, of the Government, for the purpose of securing a deferred annuity to him, or making provision for his wife or children (section 7 (1)

(39) The words "and any sums section 58 F" were inserted by section 3 of Act XII of 1929

proviso), (*ii*) paid by him to an Insurance Company in respect of an insurance or deferred annuity on his own life or on the life of his wife, or (*iii*) paid by him as a contribution to any of the provident funds mentioned in section 4 (3) (*iv*), or (*iv*) paid by him or his employer and exempted as contribution to a recognised provident fund under section 58 F, provided however, that the total amount on which an abatement will be permitted may not exceed one sixth of the total income of the assessee

A member of a recognised provident fund under Chapter IX A can therefore get a maximum abatement of tax on one sixth of his salary under section 58 F and the difference between the above abatement and one sixth of the tax on his total income under section 15 To ascertain his total income for this purpose only his own contributions to the fund should be added to his salary and not his employer's contributions or interest—*see* section 58 E

Widows, etc, Funds—

Contributions to the Widows Orphans and Old Age Contributory Pension Fund 1925 are exempt from income tax since they are deducted under the authority of Government from the salaries of the soldiers concerned for the purpose of securing to them a deferred annuity and of making provision for their wives and children (*Income-tax Manual* para 56)

Combined Life and Accident, etc, policies—

Out of the premia paid in respect of a policy that covers the risks of sickness and accidental injury and also the risk of death, only so much as is attributable to the risk of death (from whatsoever cause) is admissible as deduction from the income liable to tax The portion of the premia so attributable should be settled in consultation with the Insurance Company concerned whose formula should be accepted unless there appears to be some strong ground for modifying it (*Income tax Manual*, para 56)

Withdrawals from Provident Funds—

No rebate of income tax is allowed on any sum withdrawn by an assessee from his Provident Fund in order to pay his life insurance premium, or temporarily for any purpose All such withdrawals whether repaid or not are in the nature of a loan, and the amounts involved have all received exemption already once

Registered firm—Partner of—Insurance on life of—

Rebate of income tax in respect of a premium paid on account of life insurance is admissible to a partner of a registered firm individually whose income is taxed at source, in

addition to the refund of tax to which he may be entitled und section 48 (*Income tax Manual*, para 56)

It should be noted that section 15 does not require that t income in respect of which abatement is given should have be directly assessed in his own hands Under section 15, abateme may be given up to one sixth of total income, and total incom under section 16, includes the income taxed in the hands of t firm and dividends of companies This line of reasoning mak no distinction between registered firms and unregistered on and it is doubtful, considering the scheme of the Act, which tax unregistered firms at graduated rates like individuals and den refund to partners in them, whether even partners of register firms can get the abatement under section 15 In this view t above instruction in the Income tax Manual is a concession

Sterling—Conversion of—

For the purpose of an abatement claimed by an assessee und this section, insurance premia payable in sterling should be convert *at the rate of exchange in force on the day on which the premium pa ment was made in cases where the assessee is unable to state the actu* cost of remittance (*Income tax Manual* para 56)

Procedure—

A claim for abatement under this section must, if the payment made otherwise than by a deduction from salary be supported either—

(*a*) by the original receipt of the Insurance Company or fun

(*b*) where the claim is made by a servant of the Governme or of a local authority by a copy of the original receipt presented alo with the original to the officer who pays the salary and attested by th officer who should after such attestation return the original with a no endorsed upon it that it has been produced and allowed for a copy bei attached to the bills sent with the list of payments, or

(*c*) by a duplicate receipt or certificate of payment given b the Insurance Company or provident fund provided a certificat given that the original receipt is lost or is not forthcoming

Where the Income tax Officer is satisfied that none of the abo prescribed documents can be produced without an amount of dela expense or inconvenience which under the circumstances of the cas would be unreasonable he may accept such other proof of payment the premium as he may deem sufficient

Abatement on account of insurance may be given effect to by t person deducting income tax from salary at the time of payment und section 18 (2)

Where the payment on account of insurance premia etc is n claimed at the time when tax is deducted from salary, it may be claime

in the assessment and in the return given by the assessee under section 22 (2)

While strictly speaking abatements on account of insurance premia should only be made in assessing the income of the year in which the premia were paid the rigid enforcement of this interpretation is likely to cause considerable inconvenience to assessees who desire that the abatement should be given effect to when tax is deducted from their monthly salary particularly in cases where the premia have been paid to foreign companies towards the end of a financial year and the receipts for the premia are not forthcoming until the following financial year In such cases abatements of insurance premia may be allowed by officers responsible for deducting income tax from salaries under section 18 (2) at the time of payment of the salary provided that the premia in respect of which abatement is claimed have been paid within six calendar months ending with the close of the month for which the salary is drawn

While the officers is responsible for deducting income tax at the source under section 18 (2) of the Act should allow an abatement where claimed they need not carry out a check to see whether the abatement claimed under this section exceeds one sixth of the salary of the officers concerned This can be looked after by the Income tax Officer to whom returns are furnished under section 21 The deducting authority should however see that claims for such abatements are made within the period prescribed (*Income tax Manual* para 56)

'Paid by him —

There is no definition of the word 'paid', but the provisions of section 13 will evidently govern this section if the assessee is assessed under sections 10 to 12 But this will not allow an assessee to treat premiums as 'paid' in those cases in which premiums are adjusted by the insurance company out of sums at credit of the assessee, *e g* bonuses on policies or loans granted [40]

Firms Companies etc —

The relief can be allowed only to individuals and to Hindu undivided families It cannot be allowed to firms, companies or other associations of individuals In regard to the latter feature, the law is the same as in the United Kingdom—See *Curtis v Old Monkland Conservative Association*[41] in which the point was whether the Association was exempt because of its income falling below £160, and it was *held* that no kind of relief (which includes relief on account of insurance premia) was admissible to persons other than individuals A similar decision in regard to a company is *Mylam v Market Harborough Advertiser Company, Ltd*[42]

(40) See *Hunter v R* 5 Tax Cases 13 *Watkins v Hugh Jones* 14 Tax Cases 94

(41) 5 Tax Cases 189

(42) 5 Tax Cases 95

But see notes under section 10 regarding insurance on the life of partners, employees, etc, and notes *infra* as regards the position of partners of firms

Endowment policies—

'Endowment' policies are policies on the 'life' of a person[43] Similarly, no doubt are the various recent day developments of endowment policies *e g* guaranteed option policies, *double endowment policies etc* but not policies that are known in the Insurance world as "pure endowments", that is, contracts which provide for the payment of fixed sums at fixed dates death not being one of the contingencies provided against by the policy[44]

Per Lord Justice Buckley—Next I come to a consideration—of the true meaning of the words insurance on his life There would to my mind be a significant difference if the preposition were of and not on I can quite agree that if you speak of insurance of the life that as a matter of English may mean a guarantee of a sum to be paid if the life ceases to exist—if the life drops That would be an insurance of it The insurance 'on' it is to my mind a different thing It seems to me that means the insurance of a sum dependent upon it The thing mentioned now becomes a contingency upon which the insurance is to be paid The contingency is death or no death—death or life—and an insurance on life in that sense is an insurance of a sum payable or not payable according as the contingency of life or death is answered one way or the other Regarded thus it is quite plain that an insurance on life includes at a date as an obligation to pay a sum of money if life ceases at such time as it should happen to cease The words I think include an insurance on life in the sense of an obligation to pay a sum of money on an event dependent upon the contingency of human life If that be sound of course it follows that the whole of this premium is deductible because this is altogether an insurance on life[45]

''Insurance and Annuity are words not of scientific law but of common business' per Hamilton J

United Kingdom law—

The law in the United Kingdom is different in several respects Till 1920, when the law was altered at the instance of the Royal Commission it was necessary that the payment should be an 'annual payment A 'single premium paid for a policy could not be allowed exemption as it could in India[46] Also the contract should be—

(43) *Gould v Curtis* 6 Tax Cases 293

(44) *Joseph v Law Integrity Insurance Co* (1912) 2 Ch 581 and *In re National Standard Life Assurance Corporation* (1918) 1 Ch 427

(45) *Gould v Curtis* 6 Tax Cases 293 at 309

(46) See *Turton v O Brien* Tax Cases 1 0

'with any insurance company legally established in the United Kingdom or in any British possession lawfully carrying on business in the deferred annuity with the National Debt Commissioners" Section 32 Act of 1918

In India, there are no such restrictions, and it does not matter where the company carries on business In the United Kingdom, the allowance made cannot exceed 7 per cent of the capital sum assured and payable at death or £100 per annum, and the rate of rebate on policies insured after June 1916 is restricted to a certain maximum rate And there are various special provisions about 'war insurance premiums' On the other hand, India has its own problem of the Hindu undivided family

Insurance—Joint lives—

Two persons who were joint Directors in a company took out an insurance policy on their lives jointly, each of them agreeing to pay half of the premium A trustee was responsible for collecting the premiums from these two persons and paying them over to the insurance company, and in the event of the death of either of the Directors the capital sum payable under the insurance policy was to be paid to the trustee *Held*, that the insurance premia paid by the Directors could not be deducted from their remuneration as Directors as premia paid on insurance on their lives

Per Rowlatt, J—' Mr Wilson has not made an insurance at all He has made an insurance jointly with another person That is not an insurance by him *Prima facie*, a contract by the two jointly is not describable as a contract by one of them only Secondly it is not on his life it is on the joint lives It is not an insurance on his life *accurately speaking at all nor has he paid the premium* for any such insurance ' [47]

This decision, however, will not preclude an allowance, if the insurance is made jointly on the lives of a husband and wife or of two or more male members of a Hindu undivided family, though there is no clear provision in terms, in the section permitting such allowances It would seem however, an inevitable corollary from the section that if premia paid on the separate lives of a husband or wife or individual male members of a Hindu undivided family can be allowed, premia paid on insurance policies taken out on their joint lives should also be allowed

(47) *Wilson* v *Simpson* 10 Tax Cases 753

16 (1) In computing the total income of an assessee sums exempted under the proviso to sub-section (1) of section 7, the provisos to section 8, sub-section (2) of section 14 and section 15, shall be included

Exemption and exclusions in determining the total income

(2) For the purposes of sub-section (1), any sum mentioned in clause (*a*) of sub-section (2) of section 14 shall be increased by the amount of income-tax payable by the company in respect of the dividend received

Tax deducted or collected at source to be included in total income—

Section 16 (2) (which provides that the amount received by a shareholder in a company by way of dividend shall be increased by the amount of income tax payable by the company in respect of the dividend received) and section 18 (4), (which provides that, where income tax is deducted at the source from salaries and interest on securities the tax so deducted shall for the purposes of computing the income of an assessee, be deemed to be income received) have been inserted in order to make it clear that in the cases of taxation at the source and of the deduction of tax at the source it is the gross amount of the income (*i e* including the tax deducted), which is to be taken into account in determining the rate at which an assessee shall be liable to income tax on the rest of his income and also his income for liability to super tax (*Income tax Manual*, para 57)

Change of Partnership—

As regards 'total income' when there is a change of partnership in a firm, see section 26

Payable—

It is not necessary that the company should actually pay tax on the profits Cases can arise in which a company declares dividends without itself paying any tax

The method of 'grossing up' dividends is as follows With income tax at a maximum rate of 18 pies in the rupee, for every 14½ annas of net dividend received by the shareholder, his total income is computed to be one rupee

As to how far a dividend represents the division between the shareholders of a fund which has borne tax in the hands of the company, see *Grimson* v *Inland Revenue Commissioners*[48] set out under section 48

(48) 9 A T C 170

Scope of Section—

This section is of importance because 'total income' not only determines the liability to tax but the rate of tax payable by an assessee Total income does not include income which under the charging sections (4 and 6) is not liable to tax That is to say, none of the items exempted, *e g*, agricultural income, casual receipts not connected with business, etc, can be taken into account Total income is not the same as taxable income or income on which tax is payable by the assessee directly Taxable income had a different meaning in the 1918 Act (see notes under section 14)

'Total income' includes income in respect of which tax has been paid at source or by others It includes (1) items exempted from tax under section 7 (1), *i e*, deductions under the authority of Government for securing the assessee a deferred annuity or provision for his wife and children, (2) the interest on tax free securities (proviso to section 8), (3) the dividends received from companies which have been assessed [see section 14 (2) (*a*)], (4) share of profits in a firm assessed to tax (not the actual profits received by the partner) [see section 14 (2) (*b*)], (5) tax payable on (3)—(at the rate of 1½ annas per every 14½ annas of (3) and (4), assuming the maximum rate of tax to be 1½ annas in the rupee), but *not* income from a Hindu undivided family In the 1918 Act, income from a Hindu undivided family was also taken into account

Total income being so determined, the assessee's liability to tax, and the rate that he should pay are fixed by the Finance Act But he need not pay any further tax in respect of income already taxed at source On the other hand, he can get a refund under section 48, if eligible in respect of tax deducted at source

Rule 19 set out under section 22 lays down the form in which details of 'total income' should be furnished to the Income-tax Officer

Special definitions—

Note that 'total income' has been given a different definition from that in section 2 (15) for the purpose of section 48, for the purpose of the Finance Act, and in section 58 E (exemption in recognised provident funds)

Reduction of tax when margin above a certain limit is small

17 Where, owing to the fact that the total income of any assessee has reached or exceeded a certain limit, he is liable to pay income-tax or to pay income-tax at a higher rate,

the amount of income-tax payable by him shall, where necessary, be reduced so as not to exceed the aggregate of the following amounts, namely —

(*a*) the amount which would have been payable if his total income had been a sum less by one rupee than that limit, and

(*b*) the amount by which his total income exceeds that sum

Section how to be applied—

In applying this section difficulty arises from the ambiguity of the expression "the tax shall not be payable by the assessee" in S 14 (2) (*a*), Section 8 (Proviso), and Section 7 (Proviso) This phrase is used in the Act in regard to three entirely distinct classes of income

(1) Income that is excluded from 'taxable income' such as interest on tax free securities, on which the assessee is not even taxed indirectly, and deductions for provident funds, etc, (2) Income that is excluded from 'taxable income' but on which the assessee *is indirectly taxed* but which does not *affect his personal liability to tax or eligibility for a refund* (*e g*, a share in an *unregistered* firm), (3) Income on which the assessee is taxed at source, but which *affects his personal liability to tax or eligibility to refund, e g*, dividends or a share in a *registered* firm

Class 3 is for all practical purposes on the same footing as (*a*) salaries, or (*b*) interest on taxed securities though the Act does not say that the "tax shall not be payable by the assessee" on the two latter classes of income The only difference between Class 3 and salaries, etc, is that in the former the tax at source is paid by some one else than the assessee In calculating marginal relief under Sec 17, it is obvious that only income under Classes 1 and 2 should be deducted from the marginal or subliminal income and not Class 3

Restriction of income tax where margin of income above a certain limit is small—

Section 17 is designed to remedy the anomaly which previously existed where an assessee with an income just in excess of one of the stages in the Finance Act and therefore liable to pay income tax at a higher rate than if his income were just below that stage, found himself, after the payment of the tax, worse off than he would have been, had his taxable income been below that stage

Illustration—

Income	Tax payable if section 17 had not been passed	Tax now payable under section 17
Rs	Rs A	Rs A
1 999	Nil	Nil
2 000	52 1	1 0
2 020	52 10	21 0
4 999	130 3	130 [illegible]
5 000	156 4	131 3

The marginal relief allowed under section 17 and the exemptions referred to in S 7 (1), Proviso to Ss 8 and 15 (1) should not be regarded as alternatives The correct method of working the two sections concurrently is as illustrated in the following example —

If a man's total income is Rs 5,010 and he pays Rs 100 as Insurance premia, the tax he should pay is that on Rs 4,999 *minus* Rs 100 (*i e* Rs 4,899) at five pies plus Rs 11 The tax payable will be the same if his total income is Rs 5,010 of which Rs 100 is derived from tax free securities or from an unregistered firm that has been assessed to income tax, but if the Rs 100 were derived from a registered firm, or from dividends the total tax to be suffered would be Rs 141 3 0 against which credit would have to be given for the tax indirectly suffered on the share of the firm's income or the dividend, Rs 9 6 0 so that the net sum *payable* would be Rs 131 13 0

The following points should be borne in mind in applying section 17 where a portion of the assessee's income is derived from an unregistered firm that has paid income tax —(*i*) Income tax is not "payable" by a partner in a firm on his share of the firm's income (*ii*) Relief is to be given to an assessee in respect of the "income tax payable by him" (*iii*) Section 17 is to be applied (*a*) "where necessary," (*b*) in order to "reduce" the tax, and (*c*) so that the result of an assessee's total income exceeding a sum after which the rate of tax rises, shall not be that the extra tax due to the rise in the rate is greater than the excess of the total income over the maximum sum liable to the lower rate The section is not to be applied where it is not necessary to do so that is, where the result of applying it would not be to reduce the tax (*Income tax Manual*, para 58)

Effect of set off—

Where an assessee has income from more than one source, the 'total income' has to be ascertained after 'set off' under

section 24 Thus, if the assessee has a loss under 'business' and also 'income from securities', he would be taxed on the net income after *set off*, but would be credited with the tax collected at source on the securities less any amounts refunded under section 48

United Kingdom law—

There was a corresponding provision in the United Kingdom law also, but it was repealed in 1920, and a complicated system of marginal relief is now given in respect of insurance premiums, 'earned' income and income of persons over 65 years (see section 32 (9) of the 1918 Act, and section 15 of the Finance Act of 1925)

Deductions under section 16—

The deductions referred to in section 16 and the marginal relief allowed under section 17 should not be regarded as alternatives The words "where necessary" in section 17 merely refer to the fact that there are zones outside which the application of section 17 will not give any relief The words 'the amount which would have been payable' in section 17 (*a*) must be interpreted to mean the amount which would have been payable, other things being the same "Total income" includes the amounts deducted in respect of insurance premia, etc, referred to in section 16 The proviso to section 7 (1), the provisos to section 8, section 14 (2) and section 15 distinctly lay down that the assessee shall not pay tax on the sums to which they severally refer There is nothing in section 17 to suggest that this clear provision of law is intended to be set aside if relief is given under section 17 Moreover, if the theory of alternatives is followed, the result will be that a person, whose income is within the zone of marginal relief above Rs 5,000 and who pays insurance premia, may have to pay a disproportionately larger tax than a person with an income just below Rs 5,000 who pays the same amount as insurance premia, and this is the very anomaly that section 17 was intended to remove

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CHAPTER IV

DEDUCTIONS AND ASSESSMENT

Payment by deduction at source

18 (1) Income-tax shall, unless otherwise prescribed in the case of any security of the Government of India, be leviable in advance by deduction at the time of

Illustration—

Income	Tax payable if section 17 had not been passed	Tax now payable under section 17
Rs	Rs A	Rs A
1 999	Nil	Nil
2 000	52 1	1 0
2 020	52 10	21 0
4 999	130 3	130 [illegible]
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The marginal relief allowed under section 17 and the exemptions referred to in S 7 (1), Proviso to Ss 8 and 15 (1) should not be regarded as alternatives The correct method of working the two sections concurrently is as illustrated in the following example —

If a man's total income is Rs 5,010 and he pays Rs 100 as Insurance premia, the tax he should pay is that on Rs 4,999 *minus* Rs 100 (*i e*, Rs 4,899) at five pies plus Rs 11 The tax payable will be the same if his total income is Rs 5,010 of which Rs 100 is derived from tax free securities or from an unregistered firm that has been assessed to income tax, but if the Rs 100 were derived from a registered firm, or from dividends the total tax to be suffered would be Rs 141 3 0 against which credit would have to be given for the tax indirectly suffered on the share of the firm's income or the dividend, Rs 9 6 0 so that the net sum *payable* would be Rs 131-13 0

The following points should be borne in mind in applying section 17 where a portion of the assessee's income is derived from an unregistered firm that has paid income tax —(*i*) Income tax is not "payable" by a partner in a firm on his share of the firm's income (*ii*) Relief is to be given to an assessee in respect of the "income tax payable by him" (*iii*) Section 17 is *to* be applied (*a*) "where necessary," (*b*) in order to "reduce" the tax, and (*c*) so that the result of an assessee's total income exceeding a sum after which the rate of tax rises, shall *not* be that the extra tax due to the rise in the rate is greater than the excess of the total income over the maximum sum liable to the lower rate The section is not to be applied where it is not necessary to do so, that is, where the result of applying it would not be to reduce the tax (*Income tax Manual*, para 58)

Effect of set off—

Where an assessee has income from more than one source, the '*total income*' has to be ascertained after '*set off*' under

section 24. Thus, if the assessee has a loss under 'business' and also '*income from securities*', *he would be taxed on the net* income after *set off*, but would be credited with the tax collected at source on the securities less any amounts refunded under section 48

United Kingdom law—

There was a corresponding provision in the United Kingdom law also, but it was repealed in 1920, and a complicated *system of marginal relief is now given in respect of insurance* premiums, 'earned' income and income of persons over 65 years (see section 32 (9) of the 1918 Act, and section 15 of the Finance Act of 1925)

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CHAPTER IV

DEDUCTIONS AND ASSESSMENT

18 (1) *Income-tax shall, unless otherwise prescribed in the case of any security of the Government of India, be leviable in advance by deduction at the time of*

Payment by deduction at source

payment in respect of income chargeable under the following heads —

(i) 'Salaries', and

(ii) Interest on securities

(2) Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment deduct income-tax on the amount payable at the rate applicable to the estimated income of the assessee under this head

Provided that such person may, at the time of making any deduction, increase or reduce the amount to be deducted under this sub-section for the purpose of adjusting any excess or deficiency arising out of any previous deduction or failure to deduct

[49] (2 A) Notwithstanding anything hereinbefore contained, for the purpose of making the deduction under sub-section (2), there shall be included in the amount payable any income chargeable under the head "Salaries" which is payable to the assessee out of India by or on behalf of Government, and the value in rupees of such income shall be calculated at the prescribed rate of exchange

(3) The person responsible for paying any income chargeable under the head "Interest on securities" shall, at the time of payment, deduct income-tax on the amount of the interest payable at the maximum rate

(4) All sums deducted in accordance with the provisions of this section shall, for the purpose of computing the income of an assessee, be deemed to be income received

(5) Any deduction made in accordance with the provisions of this section shall be treated as a payment of

(49) This sub section was added by section 8 of Act XVI of 1925

income-tax on behalf of the person from whose income the deduction was made, or of the owner of the security, as the case my be, and credit shall be given to him therefor in the assessment, if any, made for the following year under this Act

Provided that, if such person or such owner obtains, in accordance with the provisions of this Act, a refund of any portion of the tax so deducted, no credit shall be given for the amount of such refund.

(6) All sums deducted in accordance with the provisions of this section shall be paid within the prescribed time by the person making the deduction to the credit of the Government of India, or as the [Central Board of Revenue][50] directs

(7) If any such person does not deduct and pay the tax as required by this section, he shall without prejudice to any other consequences which he may incur, be deemed to be personally in default in respect of the tax

(8) The power to levy by deduction under this section shall be without prejudice to any other mode of recovery.

(9) Every person deducting income-tax in accordance with the provisions of sub-section (3) shall, at the time of payment of interest, furnish to the person to whom the interest is paid a certificate to the effect that income-tax has been deducted, and specifying the amount so deducted the rate at which the tax has been deducted, and such other particulars as may be prescribed.

Rule 10 All sums deducted in accordance with the provisions of section 18 of the Act, shall be paid by the person making the deduction, to the credit of the Government of India, on

(50) These words were substituted for the words "Board of Inland Revenue" by S 4 and Schedule of Act IV of 1924

the same day as the deduction is made in the case of deduction by or on behalf of Government, and within one week from the date of such deduction, in all other cases

Provided that the Income tax Officer may, in special cases, and with the approval of the Assistant Commissioner, permit a local authority, company, public body or association, or a private employer to pay the income tax deducted from salaries quarterly on June 15th, September 15th, December 15th, and March 15th

Rule 11 In the case of income chargeable under the head "Salaries", where deduction is not made by or on behalf of Government, the person paying the salary shall pay to the credit of the Government of India by remitting the amount to the Income tax Officer concerned or to such officer as he may direct, and shall send therewith a statement showing the name of the employee from whose salary the tax has been deducted, the period for which the salary has been paid, the gross amount of the salary, the deduction for a provident fund or insurance premia, and the amount of tax deducted

Rule 11 A The prescribed rate of exchange for the calculation of the value in rupees of any income chargeable under the head "Salaries" which is payable to the assessee out of India by or on behalf of Government, shall be the rate notified by the Controller of the Currency in respect of the recovery of contributions to the Indian Civil Service Fund for the month in which such income is payable

Rule 12 In the case of income chargeable under the head "Interest on securities", where the deduction is not made by or on behalf of Government, the person responsible for paying the interest shall pay to the credit of the Government of India by remitting the amount to the Income tax Officer concerned or to such officer as he may direct, with a statement showing the following particulars —

(*i*) Description of securities,

(*ii*) Numbers of securities,

(*iii*) Dates of securities,

(*iv*) Amounts of securities,

(*v*) Period for which interest is drawn,

(*vi*) Amount of interest, and

(*vii*) Amount of tax

Rule 13 The certificate to be furnished under section 18 (9) of the Act by any person paying interest chargeable to in-

come tax on any security of the Government of India or of a local Government, shall be in the following form —

Draft No[1]——————————

Certified that Rs ——————being income tax at the rate of——pies per rupee has been deducted by draft of this date from Rs —————— being the amount of interest

for Rs ——————
on[2]——————for Rs —————— standing in the name
for Rs ——————

of——————————

——————————19

Superintendent or Principal Officer

(To be signed by claimant)

I hereby declare that the securities on which interest as above specified has been received were my own property, and were in the possession of——————————at the time when income tax was deducted

Signature——————

Date——————

N B—The securities to be produced when required in support of any claim

Rule 13 A The certificate to be furnished under section 18 (9) of the Act by the person paying any interest on debentures or other securities for money issued by or on behalf of a local authority or a company, shall be in the following form —

"Name of $\frac{\text{Local Authority}}{\text{Company}}$ ——————————

Address——————————

To——————

$\frac{\text{I}}{\text{We}}$ hereby certify that Rs being income tax at the rate of pies per rupee has been deducted from Rs being the amount of interest at the rate of per cent per annum due[3] on debentures Nos of Rs each of the [4] and

(1) This number also appears in the interest cages on the back of the Securities

(2) Name of Security

(3) The date interest is payable

(4) Here enter the name of the local authority or the company

that it has been or will, within the prescribed period, be paid by $\frac{me}{u}$ to the Government of India, at

Principal Officer or Managing Agent

——————19

(To be signed by claimant)

I hereby declare that the securities on which interest is above specified has been received, were my own property and were in the possession of
at the time when income tax was deducted

Signature——————

Date——————

N B—The se urit es to be produced n support of any claim

Scope of Section—

This section provides for the *deduction of tax at the source* as distinguished from *taxation at the source*—see sections 14 and 16 The tax so deducted is paid over by the persons making the deduction to the credit of the Government of India within the period specified in rule 10 along with a statement giving the details shown in rules 11 and 12 Such deductions of income tax are, under sub section (5) of section 18, treated as payments of income tax on behalf of the persons from whose income or interest the deduction was made, and credit is given to them in the assessment of their income if an assessment is made of their other income

References—

As to the meaning of 'Salaries', see section 7, and as to that of 'Securities', see section 8

Overseas pay—

Sub section (2 A) which was added by Act XVI of 1925 provides that tax shall be deducted in India, at the time of payment of the remaining salary in India, in respect of all payments on account of salary made out of India by and on behalf of Government But for this provision tax can be deducted only by an assessment under section 23 and not at source It does not impose any liability to tax which is laid by section 4

Credit given—

A refund of tax under section 48 is a different proceeding from an assessment under section 23, though as a matter of convenience refunds are granted during an ass ess

ment and the form of Return laid down in Rule 19 contemplates such adjustments The admissibility of refund will depend on the conditions laid down in section 48, and the whole of the tax collected at source cannot be automatically claimed or refunded For example if the assessee is a non resident, he will not get any refund if he is not a British subject or a subject of an Indian State, and if such a subject will get refund only on the basis of his "world income" Similarly even in respect of residents, eligibility for refund will depend on whether there is a difference in *rates* of taxation at source and on the individual s assessment

Leave salary—

All leave salary paid out of India to Government servants on leave out of India has been exempted from tax, see section 60 Any sterling overseas pay or other sum that may be paid outside India to an officer on leave out of India on account of his salary while on leave is, therefore, exempt from income tax The fact that a part of the leave salary is drawn in India does not affect exemption of the balance drawn in the United Kingdom The part of the leave salary that is paid in sterling in the United Kingdom to an officer on leave out of India should not therefore, be included in the income from which tax is deducted at source by the officer paying him the rupee portion of the leave salary in India The same principle applies to other payments falling under "salaries ' within the meaning of section 7 made partly in India and partly out of India and exempt under any notification issued under section 60 *e g* the salary paid in the United Kingdom to an officer on duty in that country

Responsibility of person paying salary or interest—

Any person required to make a deduction under section 18 who fails to do so, may himself, under sub section (7), be deemed to be personally in default in respect of the tax while he is also liable to be prosecuted for an offence punishable under section 51 (*a*)

Persons making deductions at the source are indemnified for the deduction under section 65

Where tax cannot be deducted at source—

The provisions of this section, obviously cannot apply to cases where the payments are made outside British India as for example, the payment of "interest on securities" in Indian States or in foreign countries, or the payment of "salaries" by foreign employers to residents in British India It is for this reason that section 19 of the Act specifies that in any case where income

tax has not been deducted in accordance with the provisions of section 18, the tax is payable by the assessee direct This provision covers, not only cases where the employer or the person paying "interest on securities" does not reside in British India but also cases where owing to an assessee's salary being less than Rs 2,000, income tax has not been deducted (*Income tax Manual*, para 59)

Previous law—

The Act of 1918 provided that where a payment was a non recurring payment, the tax should be deducted at the rate appropriate to that particular sum, as if it were the whole of the assessee's income, and that where a payment was a recurring payment, the tax should be deducted on the assumption that the total income of the assessee amounted to twelve times the recurring sum As these provisions gave rise to a considerable amount of unnecessary trouble to assessees and their employers as well as to income tax authorities, section 18 (2) of the Act now provides that deductions from salary shall be made at a rate which should approximate as closely as possible to the rate appropriate to the total assessable income of the assessee under the head "salaries", and it further empowers the person deducting income tax from "salaries" to rectify, in subsequent deductions, mistakes made in previous deductions Thus, if an employee's regular monthly salary is Rs 500, the tax would be deducted by the employer at the rate appropriate to Rs 6,000, but if such an employee received a commission or bonus or arrears of pay or officiating allowance amounting to Rs 5,000, the employer is empowered not only to make deductions in future at the rate appropriate to an income of Rs 11,000, but also to make up the deficiency in previous collections owing to the lower rate having been applied

Under the 1918 Act, private employers could not deduct tax at source on salaries of employees

See also sections 7, 8 and 13 of the 1886 Act under which only the interest on Government Securities and the salaries and pensions of Government servants and servants of local authorities were subject to deduction of tax at source

Advances of salary—

Salaries are sometimes paid or adjusted annually Mean while, the employee may draw (and even overdraw) against the salary due or that will become due to him If employers claim to deduct as business expenses the sums thus drawn by their

employees, this can only be done on the ground that the sums represent salary and that, therefore, tax should be deducted at source from all such sums. When it is found that tax has not been deducted, the employee should be assessed direct on all such sums if they have been allowed to the employer as business expenses If they are not so allowed, they need not be taxed in the employees' hands whether by deduction or by direct assessment till the drawings are adjusted against salary actually earned and are claimed as business expenditure by the employer

Insurance premia—Abatement on—

For the power of an employer to allow abatements on account of insurance premia, see paragraph 56[4a] As regards private employers, it may be noted that it is open to them to make these allowances on account of insurance premia or not, according as it may suit the convenience of themselves and their employees as, if such rebate is not given when the tax is deducted at the *source, it may be claimed by the employee in the following year,* either as a refund or a set off against the amount due by him if he is assessed under section 23 (*Income tax Manual*, para 60)

Refund in cash—

The Officer responsible for collecting tax under this section is not competent to refund in cash any excess tax collected All that he can do is to adjust the excess by short collection, and *vice versa*

Under this head—

The rate to be applied to any particular payment is that applicable to the estimated income under 'salaries' for the year in which payment is made[5]

See the words "estimated income of the assessee *under this head*" in sub section (2) It is not open to the person making the payment to take into account, in making his estimate, the assessee's income from other sources than 'salaries'

Super tax—Applicability of section to—

Sub sections (4) to (9) of this section apply also to such super tax as is collected at source under sections 57 and 58 H See notes under these sections Otherwise super tax cannot be deducted at source

Recognised provident funds—

The provisions of sub sections (4) to (9) apply also to collection at source in respect of recognised provident funds See

(4a) See notes under section 15

(5) *Chalmers* v *Rex* 1 Rang 335, 1 I T C 140

section 58 H. That section gives the power to deduct tax at source

Deduction at source—Tax on 'interest on securities"—

The only securities of the Government of India (other than income-tax free securities), from the interest on which income tax is not deducted in advance are Treasury Bills

As the person paying interest on securities has no information regarding the total income of the person to whom the payment is made, section 18 (3) provides that deductions of income tax from "interest on securities" shall be made at the maximum rate fixed by the Finance Act Where the total income of the person receiving the interest on securities is less than the income to which the maximum rate applies, he is entitled under the provisions of section 48 (3) to claim a refund In order to simplify the procedure in connection with refunds section 18 (9) makes it obligatory upon the person deducting income tax from the interest on securities to issue to all security holders a certificate in the form prescribed in rule 13 or 13 A specifying the amount of tax deducted from the interest and the rate at which it has been deducted The form of certificate attached to rule 13 is suitable for Government securities only, while that attached to rule 13 A provides for securities issued by local authorities and companies and covers the case of securities payable to bearer It frequently happens however that security holders hand over their securities and bonds to their bankers for collection In that event, the certificate given by the person deducting the income tax from the security would be given to a bank for a whole block of securities In such a case, the Income tax Officer should accept a certificate from the bank in the following form and act upon it as if it were a certificate received direct from the person deducting income tax from the security —

"We hereby certify that interest on the various securities specified on the back hereof was collected by us on behalf of
and that we received payment, or were credited with the proceeds thereof (less income tax as stated on the other side) amounting to Rs

The securities specified are covered by certificates issued to the Bank under section 18 (9) of the Income tax Act, 1922

Signature of Banker————

Address————

Date————

(To be signed by the claimant)

I hereby declare that the securities on which interest as above specified has been received, are my own property and were in the possession of at the time when income tax was deducted

Signature————

Date————

(N B —The securities to be produced when required in support of any claim)

Reverse of Form

Schedule of Securities

No. & description of securities	Date of payment of interest after deduction of income tax	Period for which interest has been paid	Amount of interest (less income tax)	Remarks

A person who has other income liable to tax may, instead of claiming a refund get the amount set off against the amount due from him in the assessment made on him under section 23 by filling up the form prescribed in rule 19

The certificate under section 18 (9) must be taken by the Income tax Officer of the area in which the claimant or assessee is assessed or resides (see rule 39) as conclusive evidence of the payment of the tax, both where a refund is claimed in cash and where a set off against the tax assessed on other income is claimed

While these arrangements will facilitate the making of refunds it is desirable that refunds should be avoided as far as possible There are, for example certain institutions authorities and funds the income of which is exempt from tax under the provisions of section 4 (3) Similarly there are persons whose assessable income is less than Rs 2 000 and who are not therefore liable to tax There are other cases where the Income tax Officer may be satisfied that the income of a holder of securities while liable to tax is not likely to fluctuate so widely as to alter the rate appropriate to the total income In such cases the Income tax Officer may issue a certificate authorising the person paying the interest on securities to make no deduction of tax or to deduct tax at a lower rate than the maximum Such a certificate might be in the following form —

Income tax Office————

Dated————19

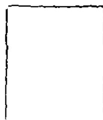
To

————————

————————

————————

I hereby authorise (1)———————————— to deduct income tax at the rate of (2)————pies in the rupee when paying the interest on the following securities to their present holder (3) ————This authorisation will remain in force until cancelled by me



Income-tax Officer

Description of securities

(1) Name and address of person paying the interest (2) Rate of income tax sanctioned (3) Name of person receiving interest

Such certificates when issued should remain in force until they are cancelled and should not be required to be renewed annually

When the owner of a security to whom a certificate is granted according to these instructions has endorsed the security to his bank for collection of interest the officer responsible for paying the interest regards the bank as the real holder of the security and takes no cognizance of any arrangement that may have been entered into between the real owner of the security and the bank with the result that the certificate standing in the name of the real owner of the security granted by the Income tax Officer becomes inoperative To avoid the possibility of paying officers refusing to act on the exemption certificate in such circumstances Treasury Officers have been instructed to act on such certificates when presented in respect of securities that have been endorsed to banks for collection of the interest if together with the exemption certificate a declaration by the bank is presented to the effect that the security continues to be the property of the person named as the owner in the exemption certificate

Applications for refund of income tax from residents of an Indian State who own securities whether of the Government of India a local authority or a Company or hold shares in a Company in British India should as in the case of residents outside India, be made to the Income tax Officer Non Residents Refund Circle Bombay

The Income tax Officer will however allow a claimant who resides in an Indian State the option of receiving payment of the refund through the Political Officer in that State that is to say, the refund voucher that will be issued by the Income tax Officer will be made payable if the person applying for the refund so desires at the Political Treasury of the Government of India in the particular Indian State or if there is no treasury under the control of the Political Officer at the prescribed British Indian Treasury (Para 61, *Income tax Manual*)

Securities held by Indian States or by Ruling Princes and Chiefs— An Indian State is not assessable to any income tax or super tax except

under the Government Trading Taxation Act that is to say unless the State carries on a trade or business Interest on securities held by Indian States is therefore not taxable Interest on securities held by Ruling Princes or Chiefs as individuals that is not as the property of the State on the other hand is taxable In applying these principles all authorities responsible for the payment of interest on securities should assume that Government securities held in the names of the Rulers of Indian States in the special non transferable form prescribed by rule 38 of the Indian Securities Rules 1920 belong to the State and not to the Rule in his personal capacity Income on such securities should therefore not be taxed In respect of other securities held in the names of the Rulers that is to say Government securities in the ordinary form and securities other than Government securities it should be assumed in the absence of proof to the contrary that the securities are the personal property of the Princes and therefore liable to tax The authorities responsible for the payment of interest on securities should not enter into any discussion with the Princes or the States as to the ownership of such securities A State claiming exemption on the ground that the securities held in the names of the Prince or Chief are really the property of the State will send a certificate from its Chief Financial Authority through the Political Agent or the Resident of the State to the Income tax Officer concerned who in turn will grant an exemption certificate which should be produced before the authority responsible for paying interest If the Income tax Officer finds any difficulty in accepting the certificate sent by the Chief Financial Authority of the State through the Political Officer he should not carry on any correspondence with the Political Officer or the State but should submit the case for the orders of the Commissioner of Income tax who will if necessary refer to the Central Board of Revenue (Para 61 A *Income tax Manual*)

United Kingdom Law—

An important difference between the law in the United Kingdom and that in India is that in the former country, if the salary falls under Schedule D the person making the annual payment has to pay tax to the Crown on the whole of his profits but is entitled to recoup himself by deducting tax from his creditors to whom he has to make annual payments whereas in India the person making the payments is charged on his net profits only that is after deducting the annual payments in so far as they can be deducted under sections 9 to 12 and is separately charged by section 18 with the duty of collecting tax at source on behalf of the Crown There is a large number of English decisions relating to the right to recoup oneself from "annual payments payable out of profits" made but they are not of much use for interpreting the Indian law

A further difference till 1927 was that the person deducting the tax in the United Kingdom did not hold it in trust for the

I hereby authorise (1)——————————— to deduct income tax at the rate of (2)—————pies in the rupee when paying the interest on the following securities to their present holder (3) —————This authorisation will remain in force until cancelled by me



Income-tax Officer

Description of securities

1) Name and address of person paying the interest (2) Rate of income tax sanctioned (3) Name of person receiving interest

Such certificates when issued should remain in force until they are cancelled and should not be required to be renewed annually

When the owner of a security to whom a certificate is granted according to these instructions has endorsed the security to his bank for collection of interest the officer responsible for paying the interest regards the bank as the real holder of the security and takes no cognizance of any arrangement that may have been entered into between the real owner of the security and the bank, with the result that the certificat standing in the name of the real owner of the security granted by the Income-tax Officer becomes inoperative To avoid the possibility of paying officers refusing to act on the exemption certificate in such circumstances Treasury Officers have been instructed to act on such certificates when presented in respect of securities that have been endorsed to banks for collection of the interest if together with the exemption certificate a declaration by the bank is presented to the effect that the security continues to be the property of the person named as the owner in the exemption certificate

Applications for refund of income tax from residents of an Indian State who own securities whether of the Government of India a local authority or a Company or hold shares in a Company in British India should as in the case of residents outside India be made to the Income tax Officer Non Residents Refund Circle, Bombay

The Income tax Officer will however allow a claimant who resides in an Indian State the option of receiving payment of the refund through the Political Officer in that State that is to say the refund voucher that will be issued by the Income tax Officer will be made payable if the person applying for the refund so desires at the Political Treasury of the Government of India in the particular Indian State or if there is no treasury under the control of the Political Officer at the prescribed British Indian Treasury (Para. 61, *Income tax Manual*)

Securities held by Indian States or by Ruling Princes and Chiefs—An Indian State is not assessable to any income tax or super tax except

under the Government Trading Taxation Act, that is to say, unless the State carries on a trade or business Interest on securities held by Indian States is, therefore, not taxable Interest on securities held by Ruling Princes or Chiefs as individuals, that is, not as the property of the State, on the other hand, is taxable In applying these principles all authorities responsible for the payment of interest on securities should assume that Government securities held in the names of the Rulers of Indian States in the special non transferable form prescribed by rule 38 of the Indian Securities Rules, 1920 belong to the State and not to the Ruler in his personal capacity Income on such securities should therefore, not be taxed In respect of other securities held in the names of the Rulers, that is to say, Government securities in the ordinary form and securities other than Government securities it should be assumed in the absence of proof to the contrary that the securities are the personal property of the Princes and therefore liable to tax The authorities responsible for the payment of interest on securities should not enter into any discussion with the Princes or the States as to the ownership of such securities A State claiming exemption on the ground that the securities held in the names of the Prince or Chief are really the property of the State will send a certificate from its Chief Financial Authority through the Political Agent or the Resident of the State, to the Income tax Officer concerned, who in turn will grant an exemption certificate which should be produced before the authority responsible for paying interest If the Income tax Officer finds any difficulty in accepting the certificate sent by the Chief Financial Authority of the State through the Political Officer he should not carry on any correspondence with the Political Officer or the State but should submit the case for the orders of the Commissioner of Income tax who will if necessary refer to the Central Board of Revenue (Para 61 A *Income tax Manual*)

United Kingdom Law—

An important difference between the law in the United Kingdom and that in India is that in the former country, if the salary falls under Schedule D, the person making the annual payment has to pay tax to the Crown on the whole of his profits but is entitled to recoup himself by deducting tax from his creditors to whom he has to make annual payments, whereas in India the person making the payments is charged on his net profits only, that is, after deducting the annual payments in so far as they can be deducted under sections 9 to 12, and is separately charged by section 18 with the duty of collecting tax at source on behalf of the Crown There is a large number of English decisions relating to the right to recoup oneself from "annual payments payable out of profits" made, but they are not of much use for interpreting the Indian law

A further difference till 1927 was that the person deducting the tax in the United Kingdom did not hold it in trust for the

Crown[6] whereas the person deducting tax under section 18 holds it for and on behalf of the Crown In the case above referred to, the assessee, who was a Company, paid some interest on mortgages and deducted tax from the interest, but the Company itself was not liable to pay any tax, having made a loss The Company went into liquidation Though it was admitted that the Company were liable to account to the Crown for the tax deducted from the interest, it was held that the Crown could not claim any priority, and that no trust was involved in respect of the amount The law was amended in 1927 empowering the Crown to make an assessment in respect of such intercepted tax.

In the case of salaries under Schedule E, however, the position is much the same as in India, though it differs in several minor details

Broadly speaking, however, there is not much similarity between the machinery of collection in India and that in the United Kingdom, and the law in the United Kingdom in this respect is not therefore of much interest

19. In the case of income chargeable under any other heads than those mentioned in sub-section (1) of section 18, and in any case where income-tax has not been deducted in accordance with the provisions of that section, the tax shall be payable by the assessee direct.

Payment in other cases

This corresponds to section 15 (7) of the Act of 1918, but has been amplified

See sub section (8) of section 18 under which the power to levy tax by deduction under that section is without prejudice to any other mode of recovery

19-A The principal officer of every company shall, on or before the 15th day of June in each year, furnish to the prescribed officer a return in the prescribed form, and verified in the prescribed manner, of the names and of the addresses, as entered in the register of shareholders maintained by the company, of the shareholders to whom a dividend or aggregate dividends exceeding such amount

Supply of information regarding dividends

(6) In re *Lang Propeller, Ltd* 5 A T C (C of A), 11 Tax Cases 46

as may be prescribed in this behalf has or have been distributed during the preceding year and of the amount so distributed to each such shareholder

History—

This section was introduced by Act XXIV of 1926, as part of the new machinery devised to catch the super tax due on the income of shareholders of companies, particularly non residents See notes under section 57 This section applies both to public and to private companies

Rules

Rule 42—A return shall be furnished by the principal officer of a Company under section 19 A, in respect of a dividend or aggregate dividends, if the amount thereof exceeds Rs 10,000

Rule 43—The return by the principal officer of a Company under section 19 A shall be in the following form, and shall be delivered to the Income tax Officer who assesses the Company —

Return under section 19 *A of the Indian Income tax Act,* 1922, *for the year* 1st *April* 19 *to* 31st *March* 19

Name of Company————————

Address of Company————————

(1) Resident Shareholders
Non Resident Shareholders ————————

Serial number	Name of shareholder	Address of shareholder	Date of issue of dividend warrants	(2) Amount of dividends	
				Net	Gross
1	2	3	4	5	6

Note—(1) Separate forms should be used for Resident and Non Resident shareholders

(2) Where dividends are issued "free of income tax" the figure to be entered in column 5 is the sum actually paid and the figure to be entered in column 6 is the aggregate of the sum so paid and the amount of income tax payable by the Company in respect of the dividends

I, , the principal officer of the Company, hereby certify that the above statement contains a complete list of the $\frac{\text{resident}}{\text{non resident}}$ shareholders of the Company

to whom a dividend or aggregate dividends exceeding Rs 10,000 was or were distributed in the period from the 1st April, 19 to the 31st March, 19 .

Dated——————19 *Signature*——————

Penalties—

The penalty for not furnishing the return in due time is prosecution under section 51 (*c*) The penalty for furnishing a false return is prosecution under section 177, Indian Penal Code See section 52 of the Act

Certificate by company to shareholders receiving dividends

20 The principal officer of every company shall, at the time of distribution of dividends, furnish to every person receiving a dividend a certificate to the effect that the company has paid or will pay income-tax on the profits which are being distributed, and specifying such other particulars as may be prescribed

Rule 14—The certificate to be furnished by the principal officer of a Company, under section 20, shall be in the following form —

Name of Company——————
Address of Company——————
Date——————

WARRANT for Rs (in words and figures or if the certificate is crossed by an entry in words stating that the amount of dividend is under the next multiple of Rs 50 above the amount in figures only) being dividend[7] at the rate of Rs (in words and figures) per share for the[8] ending on the day of 19 [9] on[10] shares in this Company registered in the name of This dividend was declared at the[11] meeting held on the[12] 19

I/We hereby certify that income tax

on the entire / on such part as is liable to be charged to Indian Income tax of the profits and gains of the Company, of which this dividend forms a part, has been, or will be, duly paid by me/us to the Government of India

(7) Or dividends and bonus
(8) Year or half year, as the case may be
(9) Here enter whether free of income-tax or not.
(10) Here enter number and description of shares
(11) Here specify number and nature of meeting
(12) Here enter date

Signature——————

Office——————

(To be signed by the claimant)

I hereby certify that the dividend above mentioned relates to shares which were my own property at the time when dividend was declared and were in the possession of

Signature——————

Date——————

Certificate by a company to shareholders receiving dividends—

The profits of a Company are charged to income tax at the maximum rate irrespective of what the amount of the profits may be (see Finance Act) and the shareholder of a Company is under section 48 (1) of the Act entitled to claim a refund on proof to the Income tax Officer that the maximum rate of income tax is greater than the rate applicable to his total income In order to get such a refund he must produce the certificate required by section 20 and prescribed in rule 14 The shareholders claiming refunds in respect of dividends paid out of profits of which a part is not liable to Indian income tax will only be able to enter approximate figures in the refund application and in the return accompanying it in respect of the amount of tax paid by the Company on the dividends and the amount of refund due but this should not prejudice the claimants in any way The Income tax Officer will accept the certificate but will apply the correct percentage Certificates should however be accepted if they supply all the prescribed particulars even though they may not be identical in phraseology or arrangement with the statutory form of certificate given in Rule 14 Duplicates of certificates should be accepted if the claimant satisfies the Income tax Officer who has to sanction the refund that the dividends in respect of the tax on which the refund is claimed had actually been paid to the claimant and if the Income tax Officer has no reason to believe that a refund has already been granted in respect of the same dividends Duplicates should not be accepted unless a convincing reason is given for not producing originals Duplicates may be accepted for example if it is alleged that the originals have been lost and the Income tax Officer has no reason to doubt the statement on the other hand duplicates should not be accepted if the originals can be produced though after some delay As in the case of the certificate regarding tax deducted from interest on securities mentioned in paragraph 61 where a shareholder in a Company is assessed to income tax on account of income in his own hands he may instead of claiming a refund ask that any rebate to which he is entitled should be set off against the tax which he is personally liable to pay and the form of return of income for individuals prescribed in rule 19 permits of this set off

The form of the certificate prescribed in rule 14 differs from the form of the certificate prescribed in rule 13 for income tax deducted from interest on securities in that it simply contains a statement that income tax has been or will be duly paid by the company and that the dividend

was declared on a certain date It contains no statement as to the rate at which tax has been or will be levied or as to the amount of tax paid or to be paid The reason for this is that in many cases it is impossible to state at what rate tax has been or will be levied on the particular profits out of which dividends are paid The dividends of a company may be distributed from profits made during the course of a financial or commercial year before the rate of tax is known or may be distributed from reserves maintained for the equalisation of dividends and composed of profits earned in previous years It should therefore, be assumed by Income tax Officers in connection with these particular certificates that tax has been levied in respect of the dividends at the rate current on the date on which the dividends were *declared*, since this is the rate to be taken into account in dealing with a claim for a refund under section 48 (1)

The form of certificate also provides for cases such as that of the tea companies which do not pay income tax on their entire profits and gains distributed as dividends

The amount of income tax so assumed to be payable by the Company in respect of the dividend declared, has, under the provisions of section 16 (2) to be added to the net dividend received, in calculating the total income of the individual shareholder

The following instructions may with advantage be followed by persons granting certificates prescribed by section 20 of the Act —

(1) The statutory form of certificate of deduction of income tax prescribed by rule 14 of the Indian Income tax Rules, should invariably be used

(2) Either (*a*) the certificate should be printed on the same sheet of paper as the actual warrant, with a line of perforation to permit of its being detached or (*b*) the dividend warrants should be machine numbered while every certificate relating to a particular dividend should be given the same number as the corresponding warrant There are cases in which Banks collect dividends on behalf of their constituents and Companies send the Banks consolidated dividend warrants in payment of all the dividends due in respect of the block of shares for which the Bank is acting and at the same time send separate certificates for the shareholders by whom the shares are owned In such a case, if certificates are issued to a Bank for say twenty constituents, relating to dividend warrant No 1 the certificates should be numbered by hand 1|1, 1|2, 1|3, to 1 20

(3) The practice adopted by certain Companies of either attaching red slips to the certificates, drawing the attention of recipients to the need for their careful preservation for a year or two, or of printing this caution in red ink on the face of the certificate, may be generally followed

(4) A note should be printed on the certificate to the effect that shareholders may claim refund of tax under section 48 (1) of the Act in respect of their dividends, if their personal rate of tax is less than the maximum rate (*Income tax Manual*, para. 63)

Associations—

This section does not apply in the case of associations of individuals which are not 'companies', e g, in the case of profits distributed by clubs or co operative societies

Dividends collected by Banks—

It often happens that the holders of shares in Joint Stock Companies, like the holders of securities, authorise their bankers to collect dividends on their behalf When they do so, it is the practice of the persons distributing the dividends to issue certificates under section 20 in the name of the bank for the whole block of shares held by the bank on behalf of its constituents so that it is not possible for an individual assessee for whom dividends are collected by his bankers to produce the certificate required by rule 14 The Income tax Officer should ordinarily accept a certificate from a responsible officer of a bank in the following form, and act upon it as if it were a certificate received direct from the person responsible for distributing dividends —

We hereby certify that dividends on the various shares specified below were collected by us on behalf of and that we received payment or were credited with the proceeds thereof amounting to Rs

The dividends specified are covered by certificates issued to the Bank under section 20 of the Income tax Act 1922

IMPERIAL BANK OF INDIA DEPOSITORS' DEPARTMENT

Calcutta, 192

Superintendent

Description of share	Holding	Period	Date of declaration of the dividends	Date or receipt of dividends	Amount of dividends

(To be signed by claimant)

I hereby declare that the shares on which dividends as above specified have been received are my own property, and were in the possession of the Imperial Bank of India Calcutta at the time when these dividends were realized

Signature——————

Date——————

N.B.—The safe custody receipt and the Bank's pass book to be produced in support of any claim (*Income tax Manual,* para 59)

was declared on a certain date It contains no statement as to the rate t which tax has been or will be levied or as to the amount of tax paid or t be paid The reason for this is that in many cases it is impossible to st t at what rate tax has been or will be levied on the particular profits o t of which dividends are paid The dividends of a company may be di tri buted from profits made during the course of a financial or commer l year before the rate of tax is known or may be distributed from re rv maintained for the equalisation of dividends and composed of profits e n l in previous years It should therefore be assumed by Income tax Offi in connection with these particular certificates that tax has been lev l in respect of the dividends at the rate current on the date on which t dividends were *declared* since this is the rate to be taken into ce t in dealing with a claim for a refund under section 48 (1)

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(2) Either (*a*) the certificate should be printed on tl sheet of paper as the actual warrant with a line of perforation t of its being detached or (*b*) the dividend warrants should b numbered while every certificate relating to a particular divider be given the same number as the corresponding warrant Tl cases in which Banks collect dividends on behalf of their constitu Companies send the Banks consolidated dividend warrants in of all the dividends due in respect of the block of shares for Bank is acting and at the same time send separate certificat shareholders by whom the shares are owned In such a case cates are issued to a Bank for say twenty constituents relating t warrant No 1 the certificates should be numbered by hand 1 1 to 1|20

(3) The practice adopted by certain Companies of enl ing red slips to the certificates drawing the attention of reci need for their careful preservation for a year or two or of pr caution in red ink on the face of the certificate may be general

(4) A note should be printed on the certificate to tl shareholders may claim refund of tax under section 48 (1) in respect of their dividends if their personal rate of tax is l maximum rate (*Income-tax Manual*, para 63)

Associations—

This section does not apply in the case of associations of individuals which are not 'companies', *e.g.*, in the case of profits distributed by clubs or co operative societies.

Dividends collected by Banks—

It often happens that the holders of shares in Joint Stock Com panies, like the holders of securities, authorise their bankers to collect dividends on their behalf. When they do so, it is the practice of the persons distributing the dividends to issue certificates under section 20 in the name of the bank for the whole block of shares held by the bank on behalf of its constituents so that it is not possible for an individual assessee for whom dividends are collected by his bankers to produce the certificate required by rule 14 The Income tax Officer should ordinarily accept a certificate from a responsible officer of a bank in the following form, and act upon it as if it were a certificate received direct from the person responsible for distributing dividends —

We hereby certify that dividends on the various shares specified below were collected by us on behalf of and that we received payment or were credited with the proceeds thereof amounting to Rs

The dividends specified are covered by certificates issued to the Bank under section 20 of the Income-tax Act, 1922

IMPERIAL BANK OF INDIA, DEPOSITORS' DEPARTMENT,

Calcutta, 192

Superintendent.

Description of share	Holding	Period	Date of declaration of the dividends	Date or receipt of dividends	Amount of dividends

(To be signed by claimant)

I hereby declare that the shares on which dividends as above specified have been received are my own property, and were in the possession of the Imperial Bank of India, Calcutta at the time when these dividends were realized

Signature————

Date————

N.B.—The safe custody receipt and the Bank's pass book to be produced in support of any claim (*Income tax Manual*, para 59)

Penalties—

The penalty for not giving the certificate under this section is prosecution under section 51 (*b*) It is doubtful if the penalty can be enforced if the dividends are distributed outside British India The shareholder will suffer if the certificate is not given, because in its absence he cannot get a refund under section 48 Apart from the prosecution by the Assistant Commissioner, it is not clear whether a shareholder can obtain a mandamus or an injunction compelling the principal officer of the Company to give him the certificate under this section

United Kingdom—

A provision corresponding to this section was introduced in the United Kingdom only in the Finance Act of 1924 (*see* section 33) The Royal Commission of 1920 had recommended such a rule, and it would seem that section 20 of the Indian Act also was inspired by the recommendation of the Royal Commission of 1920 in the United Kingdom

Annual return

21 The prescribed person in the case of every Government office, and the principal officer or the prescribed person in the case of every local authority, company or other public body or association, and every private employer shall prepare and, within thirty days from the 31st day of March in each year, deliver or cause to be delivered to the Income-tax Officer in the prescribed form, a return in writing showing—

(*a*) the name and, so far as it is known, the address, of every person who was receiving on the said 31st day of March, or has received during the year ending on that date, from the authority, company, body, association or private employer, as the case may be, any income chargeable under the head "Salaries of such amount as may be prescribed ,

(*b*) the amount of the income so received by each such person, and the time or times at which the same was paid

(*c*) the amount deducted in respect of income-tax from the income of each such person

Rules.

Rule 15.—*The returns for Government officers under section* 21 of the Act shall be prepared and submitted to the Income-tax Officer by—

(*a*) Civil Audit Officers for all gazetted officers and others who draw their pay from audit offices on separate bills; and also for all pensioners who draw their pensions from audit offices,

(*b*) Treasury officers for all gazetted officers and others who draw their pay from treasuries on separate bills without countersignature, and also for all pensioners who draw their pensions from treasuries,

(*c*) Heads of Civil or Military offices for all non gazetted officers whose pay is drawn on establishment bills or on bills countersigned by the head of office,

(*d*) Forest disbursing officers and Public Works Department disbursing officers, in cases where direct payment from treasuries is not made, for themselves and their establishments,

(*e*) Head postmasters for (*i*) themselves, their gazetted subordinates and the establishments of which the establishment pay bills are prepared by them, and (*ii*) gazetted supervising and controlling officers of whose headquarters post office they are in charge, Head Record Clerks, Railway Mail Service, for themselves and all the staff whose pay is drawn in their establishment pay bills, the Disbursing Officers, in the case of the Administrative and the Audit offices,

(*f*) Controllers of Military Accounts (including Divisional Military Supply, Marine, Field and War Controllers) for all gazetted military officers under their audit,

(*g*) Disbursing officers in the Military Works Department for themselves and their establishments,

(*h*) Chief Examiners of Accounts or Chief Auditors of Railways concerned, for all railway employees under their audit

Rule 16.—The minimum income under the head "Salaries", referred to in section 21 (*a*), shall be Rs 2,000 per annum

Rule 17.—The return to be delivered to the Income tax Officer under section 21 of the Act shall be in the following form —

Serial number	Name of person	Postal address of residence	Appointment or nature of employment	Total amount of salary wages annuity or pension paid during the year ending on 31st March 19	House allowance or value of rent free quarters	Amount of bonus gratuity fees commission perquisites or allowance (other than those shown in column 6) or profits in lieu of or in addition to salary or wages (each to be shown separately)	Total of columns 5 6 and 6 A	Deduction on account of Provident and other funds [Proviso to sec 7 1)]	Deductions on account of Life Insurance Premia (section 15)	Net amount chargeable	Amount of tax payable	Reduction under section 17	Amount of tax deducted	Whether person contributes to a recognised provident fund (Chapter IX A)	REMARKS
1	2	3	4	5	6	6 A	7	8	8 A	9	10	11	12	12 A	13

I certify that the above statement contains a complete list of the total amounts paid by——————to all persons who were receiving income on the 31st day of March, 19——at the rate of Rs 2,000 per annum, or have received during the year ended on that day not less than Rs 2,000, in respect of salary, wages, annuity, pension, gratuity, fees, commissions, perquisites or profits in lieu of or in addition to salary or wages, and that all the particulars stated are correct

Signature of person by whom the return is delivered

Date——————

Annual return of employees—

Under section 21, read with rules 15, 16 and 17, a return in the form prescribed in rule 17 must be made of all employees deriving an income of Rs 2,000 per annum or over, by the Government officers mentioned in rule 15, by every private employer and by, in the case of local authorities, companies or other public bodies or associations, the "principal officer" "or the prescribed person" The provision *that, in* the last mentioned case, the return is to be made either by the principal officer or "the prescribed person", is designed to avoid difficulties experienced particularly in the case of companies, owing to the provision of the Act of 1918 which required that the return should always be made by the principal officer" Where a company, *for example, has* got several places of business, it may be more convenient for the company that the returns under this section should be made not by the principal officer at the headquarters of the company but by officers at different branches, since this particular return has, as a rule, to be made to the local Income-tax Officer, *i e*, to the Income tax Officer of the place where the employees happen to reside The liability for making this return remains, under

section 21, with the principal officer unless another person is prescribed in the case of particular companies Such a person must be prescribed by means of a rule made by the Central Board of Revenue, *see* section 2 (10) and section 59 (2) (*e*) The object of the return is to enable Income tax Officers to see that the tax has been deducted at the source under section 18 (2), to arrange for adjustments where the collections at the source have not been made correctly, and to assess "salaried" persons under section 23 whether the tax has been collected at the source or not, where the salaried persons have other income than "salary"

This section prescribes that the return must be delivered to the Income tax Officer, but does not state to what particular Income tax Officer the return should be made Every Income tax Officer has under the provisions of section 64 (4) all the powers conferred by or under the Act on an Income tax Officer, in respect of any income accruing or arising or received within the area for which he is appointed, irrespective of whether the particular income is assessed by him or not In most cases it is convenient that this return should be made to the Income tax Officer of the area in which the employees reside, but in some cases, it may be more convenient that the return should be made to the Income tax Officer of the area in which the headquarters of a widespread business is situated It is for the Income tax Commissioner in each doubtful case, to decide to what particular Income tax Officer this return should be sent

The return prescribed under this section is the return of all employees who during the period of 12 months ending 31st March last were in receipt of salary of not less than the prescribed amount of Rs 2 000 and the return must be furnished to the Income tax Officer in the proper form before the 1st of May The obligation to make this return is a statutory one and no preliminary notice or request from the Income tax Officer is required Failure to furnish this return is punishable under section 51 (*c*) of the Act (*Income tax Manual* para 64)

Change in law—

Apart from a few verbal alterations, the important changes in 1922 were the extension of the section to private employees, and the provision for 'prescribed officers' in the case of local authorities, companies and other public bodies, etc Formerly, only the principal officer could perform the duty

Law in the United Kingdom—

Under section 105 of the English Income tax Act of 1918, returns can be called for similarly, but only by a notice being served by the assessor on the principal officer or employer Here under this section, the returns have to be sent in without any notice having to be served.

Return of income

22 (1) The principal officer of every company shall prepare, and, on or before the fifteenth day of June in each year, furnish to the Income-tax Officer a return, in the prescribed form and

verified in the prescribed manner, of the total income of the company during the previous year :

Provided that the Income-tax Officer may, in his discretion, extend the date for the delivery of the return in the case of any company or class of companies.

(2) In the case of any person other than a company whose total income is, in the Income-tax Officer's opinion of such an amount, as to render such person liable to income-tax, the Income-tax Officer shall serve a notice upon him requiring him to furnish, within such period, not being less than thirty days as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) his total income during the previous year.

(3) If any person has not furnished a return within the time allowed by or under sub-section (*1*) or sub-section (2), or having furnished a return under either of those sub-sections, discovers any omission or wrong statement therein, he may furnish a return or a revised return, as the case may be, at any time before the assessment is made, and any return so made shall be deemed to be a return made in due time under this section.

(4) The Income-tax Officer may serve on the principal officer of any company or on any person upon whom a notice has been served under sub-section (2) a notice requiring him, on a date to be therein specified, to produce, or cause to be produced, such accounts or documents as the Income-tax Officer require :

Provided that the Income-tax Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year.

Rules.

Rule 18.—The return of total income of companies required under section 22 (1) shall be in the following form, and

shall be accompanied by a copy of the profit and loss acc
referred to therein —

Income, profits or gains from business, trade, commerce

Income, profits or gains as per profit and loss account for the year ended ——————192 Rs

Add any amount debited in the accounts in respect of—

1 Reserve for bad debts
2 Sums carried to reserve for provident or other funds
3 Expenditure of the nature of charity or presents
4 Expenditure of the nature of capital
5 Income tax or Super tax
6 Rental value of property owned and occupied
7 Cost of additions to, or alterations, extensions, improvements of, any of the assets of the business
8 Interest on reserve or other funds
9 Losses sustained in former years
10 Losses recoverable under an insurance or contract of indemnity
11 Depreciation of any of the assets of the business
12 Expenses not incurred solely for the purpose of earning the profits

TOTAL

To face page 695

See amendment introduced by Act IV of 1932 providing fo summary assessment of incomes of Rs 1000 and above and less Rs 2 000 (*See* page 82)

Schedule A to rule 19, should be attached with particulars of credit and debit on account of such property entered in accounts

Declaration

I, the———————————— [Secreta etc (*see* section 2 (12) of the Act)] of the———————————(name of Company) declare that the informat against each head in this return is correctly given as shown the books of the Company as also in the accounts which h been duly audited by the auditors of the Company, and wh have been adopted by the shareholders of the Company

(*Signature*)——————

(*Designation*)——————

Dated——————19

(2) The Company shall also attach to the return a sta ment showing the sums charged in the accounts under the pro sions of section 58 K (2)

verified in the prescribed manner, of the total income of the company during the previous year

Provided that the Income-tax Officer may, in his discretion, extend the date for the delivery of the return in the case of any company or class of companies

(2) In the case of any person other than a company whose total income is, in the Income-tax Officer's opinion of such an amount, as to render such person liable to income-tax, the Income-tax Officer shall serve a notice upon him requiring him to furnish, within such period, not being less than thirty days as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) his total income during the previous year

(3) If any person has not furnished a return within the time allowed by or under sub-section (1) or sub-section (2), or having furnished a return under either of those sub-sections, discovers any omission or wrong statement therein, he may furnish a return or a revised return as the case may be, at any time before the assessment is made, and any return so made shall be deemed to be a return made in due time under this section

(4) The Income-tax Officer may serve on the principal officer of any company or on any person upon whom a notice has been served under sub-section (2) a notice requiring him, on a date to be therein specified, to produce, or cause to be produced, such accounts or documents as the Income-tax Officer require

Provided that the Income-tax Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year

Rules

Rule 18.—The return of total income of companies required under section 22 (1) shall be in the following form, and

shall be accompanied by a copy of the profit and loss account referred to therein —

Income, profits or gains from business, trade, commerce

Income, profits or gains as per profit and loss account for the year ended ——————192 — Rs A. P

Add any amount debited in the accounts in respect of—

1 Reserve for bad debts
2 Sums carried to reserve for provident or other funds
3 Expenditure of the nature of charity or presents
4 Expenditure of the nature of capital
5 Income tax or Super tax
6 Rental value of property owned and occupied
7 Cost of additions to, or alterations, extensions improvements of, any of the assets of the business
8 Interest on reserve or other funds
9 Losses sustained in former years
10 Losses recoverable under an insurance or contract of indemnity
11 Depreciation of any of the assets of the business
12 Expenses not incurred solely for the purpose of earning the profits

TOTAL

To face page 695

See amendment introduced by Act IV of 1932 providing for the summary assessment of incomes of Rs 1000 and above and less than Rs 2,000 (*See* page 82)

Schedule A to rule 15, should be attached with particulars of the credit and debit on account of such property entered in the accounts

Declaration

I, the———————————— [Secretary, etc (*see* section 2 (12) of the Act)] of the————————————(name of Company) declare that the information against each head in this return is correctly given as shown in the books of the Company as also in the accounts which have been duly audited by the auditors of the Company, and which have been adopted by the shareholders of the Company

(*Signature*)——————

(*Designation*)——————

Dated——————19

(2) The Company shall also attach to the return a statement showing the sums charged in the accounts under the provisions of section 58 K (2)

Rule 19.—The return of total income for individuals, firms, Hindu undivided families and other associations of individuals not being Companies required under section 22 (2), shall be in the following form:—

Statement of total income during the previous year.

1		2	3
Sources of Income		Amount of profits or gains or income during the previous year	Tax already charged on the income
		RS	RS
1 Salaries (including wages, annuity, pension, gratuity fees, commission, allowances, perquisites, including rent free quarters) profits received in lieu of, or in addition to, salary or wages	[See note (1)]		
1 A The contributions made by an employer to the account in a recognised provident fund of the person making the return			
1 B The interest accruing to the account mentioned in 1 A which is not exempt from income tax. [Section 58-F (2)]			
2 Interest on Securities (including debentures) already taxed	" (2)		
3 Interest on Securities of the Government of India or of local Governments declared to be income tax free	" (3)		
4 Property as shown in detail in Schedule A	" (4)		
5 Business, trade, commerce, manufacture, or dealings in property, shares or securities (details as in note 6)	" (5)		
6 Profession	" (6)		
7 Dividends from companies (Net)	" (7)		
8 Interest on mortgages, loans, fixed deposits current accounts, etc			
9 Ground rent			
10 Any source other than those mentioned above "including any income earned in partnership with others"	" (8)		
	Total		
Deductions claimed—			
(a) on account of insurance premia			
(b) on account of contributions to a provident fund to which the Provident Funds Act applies			
(c) on account of contributions to a recognised provident fund [Section 58 A (a)]			
(d) others			

I declare that to the best of my knowledge and belief, the information given in the above statement is correct and complete, that the amounts of income shown are truly stated and relate to the year ended——————and that no other income accrued or arose or was received by me / the firm / the family / the association during the said year and that I / the firm / the family / the association have no other sources of income

Signature——————

Date——————

N B —(*a*) *Income accruing to you outside British India received in British India is liable to taxation, and must be entered by you in the form*

(*b*) *All income from whatever source derived, must be entered in the form including income received by you as a partner of a firm*

Note 1 —In column 2 should be shown the gross amount of salary and not the net amount after deductions on account of income tax, provident funds etc

Note 2 — Interest on securities means the interest on promissory notes or bonds issued by the Government of India or a Local Government or the interest on debentures or other securities for money issued by or on behalf of a local authority or Company Where income tax has been deducted from the interest or where the interest has been paid income tax free the amount of tax so deducted or paid should be added to the amount of interest actually received and the gross amount so arrived at should be entered in column 2 of the statement The term 'interest on securities does not include interest on fixed deposits or mortgages or other loans which have to be shown under heading 8

The interest on securities of the Government of India or of Local Governments declared to be income tax free should be shown under head 3 Those which are not declared to be income tax free should be included under this head

Entries under this head must be supported by the certificate issued by the person or Company paying the interest under section 18 (9) of the Act

Note 3 —(*a*) The income tax payable on the interest receivable on a security of a Local Government issued income tax free is payable by the Local Government and not by the holder of the security

(*b*) Only the interest on securities of the *Government of India* or of a Local Government declared to be income tax free should be entered against this head *Such interest will not be charged to income*

tax, but it must be included in the statement of total income in order to ascertain the rate of income tax chargeable on other income *It is chargeable to super tax*

(c) Particulars of any interest on securities issued by other authorities, and stated to be free of income tax should be entered against head 2, as income tax on such interest is actually paid by these authorities on behalf of the recipients

Note 4 —The tax is payable under this head in respect of the *bona fide* annual value of any buildings or lands appurtenant thereto of which you are the owner, other than such portions of such buildings and lands as you may occupy for the purpose of your business

SCHEDULE A

Serial number	Name of village or town where the property is situated	Name of mohalla or street and number *of property* if any	*In the case of Municipalities* the name of the person in whose name the property stands *in the municipal registers*	Whether the property is occupied by owner or is let	Annual letting value *of the property*	Period during which the property remained vacant	Amount of rent *actually received for the property* if let	DEDUCTIONS								Net amount to be carried over to the *front of the form*
								Of one sixth of the annual letting value shown in column 6	Premium paid to insure the property against damage or destruction	*Interest* paid on a mortgage or charge on the property	Ground rent paid *for the* property	Land revenue paid for the property	Collection charges paid	Amount claimed on account of property remaining vacant	Total of columns 8 to 13 A	
1	2	3	4	5	6	6-A	7	8	9	10	11	12	13	13 A	14	15

Note 5 —(a) Where you keep your accounts on the mercantile accountancy or book profits system, you must file return in the following form —

Income, profits or gains from business, trade, commerce

Income, profits or gains as per Profit and Loss Account for the year ended ——————192

Rs

Add any amount debited in the accounts in respect of—
1 Reserve for bad debts
2 Sums carried to reserve for provident or other funds
3 Expenditure of the nature of charity or presents
4 Expenditure of the nature of capital
5 Income tax or Super tax
6 Drawings or salary of proprietors or partners
7 Rental value of property owned and occupied
8 Cost of additions to, or alterations, extensions improvements of, any of the assets of the business
9 Interest on the proprietor's or partner's capital including interest on reserve or other funds
10 Losses sustained in former years
11 Losses recoverable under an insurance or contract of indemnity
12 Depreciation of any of the assets of the business
13 Private or personal expenses and expenses not incurred solely for the purpose of earning the profits

TOTAL

Deduct any profits included in the account already charged to Indian Income tax and the interest on securities of the Government of India or of Local Governments declared to be income tax free

Balance

(Signature of the person making the return)——————

(Date)——————192

(*b*) Where you do not keep your accounts in such a form, you must file a statement showing how you arrive at the taxable profits *i e*, showing details of the gross receipts and of the expenditure you propose to set against those receipts No deductions are permissible on account of—

(*i*) Property owned and occupied by the owner of a business for the purposes of a business

(*ii*) Additions to or alterations extensions or improvements of any of the assets of the business,

(*iii*) Interest on the capital of the proprietors or partners of the business,

(*iv*) Bad debts not actually written off in the accounts

(*v*) Losses sustained in previous years

(*vi*) Reserves of any kind,

(*vii*) Sums paid on account of the income tax or super tax or any tax levied by a local authority other than local rates or municipal taxes in respect of the portion of the premises used for the purpose of the business,

(*viii*) Any expenditure of the nature of charity or a present,

(*ix*) Any expenditure of the nature of capital

(*x*) Any loss recoverable under an insurance or a contract of indemnity,

(*xi*) Depreciation of any kind other than that specified in the Act

(*xii*) Drawings or salaries of the proprietors or the partners,

(*xiii*) Private or personal expenses of the assessee

(*xiv*) Any expenditure of any kind which is not incurred solely for the purpose of earning the profits

If you have included any sums in your expenditure in your books, you must exclude them from the expenditure permissible for the purpose of arriving at your taxable profits

Note 6—The income profits or gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred *solely* for the purpose of such profession or vocation provided that no allowance is made on account of any of your personal expenses Professional fees received by you in any part of India (whether within British India or not) must be included by you in your receipts

Note 7—Income tax chargeable on the profits of companies is paid by the Companies so that the dividends which shareholders receive represent the net amount remaining after income tax has been paid This amount should be entered in column 2 of the statement The proportionate tax will be added in the Income tax Office

If the rate of tax applicable to your total income is less than the rate of tax applicable to the profits or gains of the Company at the time of the declaration of such dividends you may by attaching the Company s certificate received with the dividends, have the excess collected on your dividends from the Company set against the tax payable by you on your other income instead of having to apply separately for a refund

Note 8—Agricultural income from land not paying land Revenue or local rates to an authority in British India should be included under this head.

Note 9—Deductions from total income can only be made for insurance premia in respect of insurance on your own life or on the life of your wife or in respect of a contract for a deferred annuity on your own life or on the life of your wife No deduction is permissible in the case of any other form of insurance except in the case of Hindu undivided families where deductions are permissible on account of premia paid in respect of insurance on the life of any male member of the family or of his wife The original receipt or the certificate of the insurance company to which the premium was paid must be attached to the return

Sub-section (1)—

' Principal officer '—See section 2 (12)

' Company '— „ „ 2 (6)

' Income tax officer '— „ „ 2 (7)

Prescribed form and verified in the prescribed manner '—See Rule 18 above

Total Income —See section 2 (15) and section 16

Previous year —See section 2 (11)

Return of income by companies—

The return of the total income of a company must be furnished to the Income tax Officer before the 15th day of June, in each year, in the form prescribed in rule 18, which also contains the form of the verification of such return The obligation to make this return is a statutory obligation upon the "principal officer" of the company, and it is not necessary that the Income-tax Officer should send any preliminary notice or request to the company or the principal officer concerned Failure to furnish this return is punishable under section 51 (*c*) of the Act

In his discretion —

If, in any year, the Finance Act imposes neither Income tax nor Super tax, the Income tax Officer could presumably not insist upon the submission of the return, and probably no penalty would attach to the omission to furnish this return *See also* notes under section 3

Notice before passing of Finance Act—

The Income tax Officer's 'opinion' should be reasonably formed Obviously, the Income tax-Officer cannot be satisfied about the liability of a person to tax before any tax has been imposed by the Legislature It follows, therefore, that a notice issued before the passing of the Finance Act is not valid But it is not necessary that the notices should issue after the close of the 'previous year'—though the 'previous year' must obviously end before the date on which the return is due

Income-tax Officer acting unreasonably—

If an Income tax Officer acted unreasonably in forming his opinion as to the probable income of a person before asking him to submit a return, it might be possible in theory to argue that no penalty would attach to non compliance with the Income tax Officer's notice This however is merely academic On the other hand, the mere fact that a person's income is less than the taxable limit would not of itself make the Income tax Officer's action unreasonable

Sub-section (2)—

'Prescribed form', etc —see Rule 19 above

Return of income by persons other than companies—

The form of return of total income of individuals, firms or Hindu undivided families, is prescribed in rule 19 which also prescribes the form of the verification of such return. In this case, no statutory obligation rests upon the individual, firm or Hindu undivided family to make such a return until a notice has been served by the Income-tax Officer requiring such a return. The notice must allow a period of 30 days for the furnishing of the return. If, however, on receipt of such notice, the return is not furnished within due time, such failure to make a return is punishable under section 51 (*c*) of the Act.

Assessee need not sign return himself—

It is not necessary that the assessee himself should sign the return of income, but it should be signed by some one who can bind him by the signature. Otherwise, the Income-tax Officer can treat the person as in default and proceed further—by way of assessment under section 23 (4)—and if necessary, also by way of penal measures, under section 51.

Firms, etc.—

A 'person' includes a firm, or other association of individuals and a Hindu undivided family—section 2 (9); and all persons other than Companies [which are governed by section 22 (1)] have to be served with a notice under this sub-section. As to the manner of serving notice, *see* section 63 (2).

A firm's return need be signed by a single partner only, and that of a Hindu undivided family by the managing member. In all cases what is necessary is that some one whose signature will bind the assessee should sign the return.

Notice form not prescribed—

There is no prescribed form for the notice under sub-section (2); it is only the form of return of income that has been prescribed—*see* rule 19. The assessee must be given a minimum period of thirty days, within which to comply with the requirements of the notice. If not, an assessment made under section 23 (4) for failure to file a return in time is illegal; and any subsequent opportunity given to the assessee will not cure this initial defect.[1] The thirty days will evidently count from the date of receipt of the notice by the person called upon to make the return. The expression used is "thirty days" and not "one month"; the reckoning should therefore be made in days. Also

(1) *Kajorimal Kalyanmal v. Commissioner of Income-tax (U. P.)*, 3 I. T. C. 451.

note the expression "not less than" which means that just thirty days' notice is sufficient

Consequences of failure to furnish a return of income—

Where a return is not furnished in due time, whether it be a statutory return which Companies are required to furnish by the 15th of June under section 22 (1), or whether it be the return which other persons are required to furnish under section 22 (2) on receipt of a notice from the Income tax Officer calling upon them to do so the person failing to make the return is not only liable to be prosecuted under section 51 (c) but no appeal lies under the proviso to section 30 (1) of the Act against any assessment made by the Income tax Officer upon the Company or other person failing to make a return

Failure to make a return, therefore deprives the person at fault of any remedy whatsoever against the assessment subsequently made, except the remedy specified in section 27 Under that section, a person failing to make a return may within one month after the receipt of a notice of demand of the tax apply to the Income tax Officer and if he satisfies him that he was prevented by sufficient cause from making the return, the Income tax Officer shall cancel the assessment and proceed with the case *de novo* Should the Income tax Officer refuse to re open the case under section 27 the assessee may appeal under section 30 to the Assistant Commissioner but if the Income tax Officer does re open the case, whether of his own accord on an application under section 27 or under the orders of the Assistant Commissioner under section 31 on an appeal, and the assessee fails again to make a return the same provisions apply, and no appeal lies against the assessment Section 22 (2) makes it *obligatory* upon the Income tax Officer to call for returns from all assessees and as the success of the administration of the Act is largely dependent upon assessees making returns of their income every effort should be made to get every assessee to file a return At the same time it is desirable that with due regard to the fiscal interests of the Government, all Income tax Officers should administer the Act in a sympathetic spirit and in particular, should give assistance to assessees if they find any difficulty in filling up their returns. (*Income tax Manual*, para 67)

Sub-section (3)—

Sub section (3) is designed to give persons who have *bona fide* omitted to file a return or filed an incorrect return protection from prosecution under section 51 (*c*) and penalty under section 28

What constitutes failure to make a return—

See notes under section 23 (4), and the notes under section 23 dealing with the general scope of sections 22 and 23 together.

Consequence of false returns—

A person who makes a false return under section 22 is liable to be punished under the provisions of section 177 or section 182 of the Indian Penal Code which run as follows —

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A firm's return need be signed by a single partner only, and that of a Hindu undivided family by the managing member In all cases what is necessary is that some one whose signature will bind the assessee should sign the return

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(1) *Kajorimal Kalyanmal v Commissioner of Income tax (U P)*, 3 I T C 401

Accounts'—

'Books of account' have been held not to include "letters, cheques and vouchers from which books of account can be made up"—Per Cave, J, in *In re Winslow*[2 14] (a case under the Bankruptcy Acts) 'Accounts' presumably mean the same as 'books of account' The expression 'documents' is, of course, wider

Production of accounts—

Under sub section (4) of section 22 the Income tax Officer is empowered to call upon any person liable to make a return to produce such accounts or documents as he may require The production of accounts may be called for whether a return has or has not been made It is always desirable in the interests both of the assessees and of the Government that Income tax Officers should obtain a return of income before they make an assessment If however such returns are not forthcoming they should so far as possible obtain the accounts of the assessee Again if a return is made the Income tax Officer has power to call for accounts wherever he considers it necessary for the purpose of testing the accuracy of the return It is however desirable that the least possible inconvenience should be given to assessees by the detention of their accounts by Income tax Officers and Income tax Commissioners should take steps to see that accounts are not detained for any undue time or for any unnecessary purpose Steps should be taken to secure that the services of competent and reliable accountants where employed by assessees should be utilised to the fullest extent by the Income tax Officers The latter from their experience should soon know what particular auditors can be relied upon to give accurate figures Where a statement of profit and loss filed by an assessee has been certified as correct and complete by such an Accountant *the Income tax Officer should* unless he sees reason to the contrary accept the statement as correct and complete with regard to the facts mentioned in it although he will frequently have to call for details showing how various figures are made up But in such cases the accountant himself when authorised by the assessee to appear on his behalf should be asked to supply the details Income tax Commissioners should take steps to secure that the services of such accountants are fully availed of (*Income tax Manual* para 69)

Limitation on accounts to be called for—

The proviso to sub section (4) of section 22 prevents any Income tax Officer from calling upon an assessee to produce books of account going back for a period of more than three years prior to the "previous year, *i e* the accounting period This limitation applies merely to books of account it does not apply to documents No limitation is placed, by the Act, upon the power of the Income tax Officer to call for documents of any date

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(² 14) 16 Q B D 696

The limit of three years applies only if the notice is issued under this sub section There is nothing, however, to prevent the Income tax Officer from calling for older accounts under section 37 in order to test the assessee's return or evidence in support of it But failure to comply with a summons under section 37 will not have the same consequences as failure to comply with a notice under section 22 (4), and in particular an assessment cannot be made under section 23 (4) for failure to produce evidence called for under section 37[15]

'Require' means require as a piece of relevant evidence It follows from this that if the Income tax Officer can make an assessment without the documents or accounts called for there is no default in failure to produce such documents or accounts[15a]

Failure to produce accounts and documents—

Neglect to furnish accounts or documents asked for by the Income tax Officer under section 22 (4) is punishable under section 51 (*d*), and, further, under the provisions of section 23 (4) read with section 30 (1), any person who fails to comply with the requisition of the Income tax Officer for the production of accounts or documents, may not appeal under section 30 against the assessment made whether he has made a return or not He is in exactly the same position as a person who did not make a return in the first instance, his only remedy being that described in paragraph 67 (*i e*, under section 27)

Notices—More than one—

The Income tax Officer may issue more notices than one under this sub section As he proceeds with the examination of each case, he may require to see other documents and accounts that he may not have required in the first instance The fact that he so requires further accounts and documents to be produced does not mean that his earlier notices need not be complied with There can be no implied waiver of such earlier notices merely because supplementary information is called for later

Accounts etc, to be specified—Not confined to British India—

Under this sub section, it is the duty of the Income tax Officer to specify the accounts or documents that he requires Under section 23 (2), he need not do so Also, under section 22 (4), the Income tax Officer can only call for accounts or documents He cannot ask for the attendance of persons For that

(15) *Sankaralinga Nadar v Commissioner of Income tax Madras* 4 I T C 226

(15a) *Seth Ganga Sagar v Commissioner of Income tax U P* (1931)

purpose, he must invoke his powers under sections 23 and 37 The accounts and documents called for under this sub section need not necessarily be within British India, it is open to the Income tax Officer, under this sub section, to call for accounts and documents relating to branches of business abroad which are kept outside British India [16]

Accounts of foreign partnerships—

The Income tax Officer can call for accounts kept outside British India even though they relate to a partnership If there is a default, the fact that the accounts relate to a partnership will be relevant only in determining whether the assessee can be reasonably expected to produce the accounts But it would be for the assessee to show that he had no control over the accounts or that he had other difficulties constituting sufficient cause for his failure to comply with the notice of the Income tax Officer [17]

Heading of notices—

Nowhere in the Act is there any provision making it necessary for the officer serving the notice to state *the section* under which the notice is served or to state the section under which his *powers* have been granted [18]

Notice under section 22 (2)—Precedent condition—

The *Income* tax *Officer can* use *section* 22 (4) *only* if a notice under section 22 (2) has already been served upon the person, unless he happens to be the principal officer of a company Where two Income tax Officers have concurrent jurisdiction, *see* section 64, it will be sufficient if the notice under section 22 (2) is issued by the officer at the principal place of business

Three years—

Three years, in this sub section, evidently mean three accounting periods *See* section 2 (11)

Notices—On persons outside British India—Validity of—

The validity of service of notices to make a return, and of notices of assessment on non residents, has been the subject of discussion in the United Kingdom, and it was finally held by the House of Lords in *Whitney* v *Commissioners of Inland Revenue*[19] that the service of the notice was mere machinery to

(16) *Radhakishan and Sons* v *Commissioner of Income tax Punjab* 2 I. T C 345, *Somasundaram Chettyar* v *Commissioner of Income tax Burma* 3 I T C 13

(17) *Mahomed Kassim Routher* v *Commissioner of Income tax Madras*, 59 M L J 2_0

(18) *Ram Khelawan Ugamlal* v *Commissioner of Income tax* 7 Pat 852 3 I T C 225

(18-a) *Lachmandas Baburam* v *Commissioner of Income tax*, 4 I T C 61

(19) 10 Tax Cases 88

enable the Income-tax Officer to do his duty, that the principles relating to the service of writs did not apply to these notices, and that these notices were not judicial processes

The point was first considered in *Commissioners of Inland Revenue* v *Hum*[20]

Per *Rowlatt, J*—"Now the principle involved here is the principle that Acts of Parliament are *prima facie* not to be construed so as to assume jurisdiction without the realm—extra territorial jurisdiction —so as to make the jurisdiction extra territorial And of course, when it comes to the case of creating a duty abroad or creating an offence abroad both of which, of course, can be done by Parliament and can be done unquestionably in the case of British subjects (there is a difficulty with regard to others), but the Courts have to recognise it When it comes to a question of imposing a duty or creating an offence abroad, of course, the courts are bound to look narrowly at the Statute to see whether that is what is meant But I apprehend there is no difficulty of that sort in the way of what the Statute really directs is the mere service of a notice, and that is all it is. There is no international difficulty involved in serving a notice abroad I forget for the moment how you serve a notice of dishonour abroad, but if a Statute said that a person was to have a notice of dishonour served on him abroad or some notice of that sort was to be served nobody would suggest that there was any difficulty in extending that to foreign countries It may have consequences but it is a mere notice I think there is involved in this machinery the mere giving of a notice as a preliminary to the Commissioners' proceeding to do something which they are entitled to do with regard to this gentleman in respect of his present or past property in this country and that I think ought not to limit the words of the section so as to make the notice as a mere notice, null and void

In the argument, naturally, one was referred fairly often to all the cases about writs If this was a judicial process that was emanating against this gentleman there would be a great deal to be said for that sort of analogy I do not think it is that."

This point was taken up to the House of Lords in *Whitney* v *Commissioners of Inland Revenue*,[21] and Rowlatt J 's judgment was upheld

Per *Warrington, L J*, in the Court of Appeal—"Now, it is pointed out that the notice, which is the document in question, asserts no jurisdiction over the man, all that it does is to tell him he is required to do a certain act, and that if he fails to do that act somebody else will take a certain step That is all that it does With a notice of that sort,

(20) 8 Tax Cases 466.
(21) 10 Tax Cases 88

one looks to see whether any restriction is imposed by the legislative authority which gives power to serve the notice as to the place where it shall be served The only restriction alternative to personal delivery to the man himself is that it is to be left at his last known or usual place of abode or sent there by post by registered letter pre paid There is no local restriction except that if it were left otherwise than in his own personal possession it must be left at his last known place of abode or sent there by post by registered letter What they have done is they sent the letter by post That seems to me to be sufficient service and being sufficient service it is not disputed that the assessment which was made by the Commissioners in default of his complying with that notice was an effectual assessment

The argument of the appellant is substantially this that a service on the individual in this case must be a service within the jurisdiction that there is nothing which gives the Commissioners any power whatever to effect a service of such a notice out of the jurisdiction I think whether it was sent by post or not is immaterial It is said that they had no power to send a messenger with an individual notice or in any other way to give a notice which operated outside the territorial jurisdiction It seems to me that that is applying wrongly the sort of analogy which is derived from the service of writs documents which seek to enforce a personal liability against an individual by means of the jurisdiction of the Courts It seems to me that the notice in such a case as this is much more like the notices which have to be given with regard to individual contracts such as notices to terminate a lease or to exercise an option or at any rate to be of the class of notices which are referred to in Order 11 Rule 8 (*a*) of the Rules of the Supreme Court which after providing for service of certain Originating Summonses and other processes adds this Nothing herein contained shall in any way prejudice or affect any practice or power of the Court under which when lands funds choses in action rights or property within the jurisdiction are sought to be dealt with or affected the Court may without affecting to exercise jurisdiction over any person out of the jurisdiction, cause such person to be informed of the nature or existence of the proceedings with a view to such person having an opportunity of claiming opposing or otherwise intervening It seems to me that in the case of such a notice as that which is provided for in section 8 of the Income tax Act of 1918 there is no *prima facie* implication that the area within which that notice may be served is the area of territorial jurisdiction such as is prescribed or is necessary in the case of a writ I think it is for the appellant rather than for the Crown to show some limitation of the general power to service which *prima facie* is operative wherever the person to be served can be found in such a case as this

The House of Lords confirmed the decision of the Court of Appeal by a majority of 3 to 2 Extracts from the speeches representing both views are given below —

Per Lord Chancellor Cave — This enactment which does not (as was suggested) give a privilege but imposes a duty is plainly binding upon any person (whether British or not) who is within

the jurisdiction, and it may be—though on this I express no opinion—that it binds a British subject resident abroad But it is difficult to believe that the Legislature of this country can have intended to impose such a duty upon a subject of a foreign country resident and being in that country, whether he is or is not chargeable to super tax here The difficulty is increased when it is noted that by sub section (3) of the same section (section 7 of the Income tax Act, 1918) it is made the duty of every person chargeable with super tax to give notice to the Special Commissioners that he is so chargeable—an enactment which is surely inapplicable to an alien resident and being out of the jurisdiction who cannot be assumed to have any knowledge of our law, and that by sub section (4) any person who without reasonable excuse fails to make any return or to give any notice required by the section is made liable to an immediate and a continuing penalty But what right such a penalty could even in express terms be imposed upon an alien resident and being abroad, it is not easy to understand and it appears to me that sub sections (2) and (4) cannot have been intended to apply to such a person Now the power given by sub section (5) to the Special Commissioners to make an assessment to super tax according to the best of their judgment' is contingent on 'failure' to comply with the obligation to make the return under sub section (2) and I see no escape from the conclusion that where no such obligation exists there can be no such 'failure' to comply with it and accordingly that in such a case an assessment under sub section (5) cannot be made

' When a notice is sent by post, the postal authrities are only the agents of the sendor to deliver the notice The position is the same as if the sender—in this case the Special Commissioners—had sent a messenger abroad to serve the notice there upon the appellant, in person and if (as I hold) personal service of the notice in this case could not have been effectively made upon the appellant in New York it follows that the service by post was equally ineffective The regulation cannot alter the construction of the Act or enlarge the Commissioners' jurisdiction (see Lord Davey in *Barraclough* v *Brown*) [22] If the machinery provided for assessment is not applicable to the case, then there is no power to tax

' It appears to me that the whole statute is framed on the basis that direct assessment, whether to income tax, or to super tax, can only be made upon persons who are or reside in this country or on representatives in this country of persons who reside abroad, and that if it is desired to have effective machinery for charging with super tax an alien resident and being abroad who has no representative here, that machinery must be provided by an amendment of the statute "

Per *Lord Dunedin*—" It is here that I part company with the noble and learned Lord Chancellor Holding that sub-sections 2, 3 and 4 setting forth the request for and the making of the return of income from all sources are inapplicable to an alien non resident in the United Kingdom he concludes that where no return has been made

(22) L R (1897) A C 615, at p 624

there can be no failure in the sense of sub section 5, and that accordingly no assessment can be made My Lords, I cannot help feeling, with the utmost respect, that that is tantamount to making liability dependent on failure to make a return, and yet *ex hypothesi* a liability is already established But my real reason for differing from my noble and learned friend is that I look on these sub sections as mere aids to the Special Commissioners in their task, and not as conditions of their power That power is, to my mind, conferred by sub section 1 As in the cases of *Tischler*[23] and *Werle*,[24] it was held that the power given to charge a resident abroad in the name of a person acting on his behalf in the United Kingdom did not prevent a direct assessment on that person if he was in effect found in the United Kingdom, so by analogy I think that a failure of some of the provisions of the succeeding sub sections to fit a particular case does not prevent the Special Commissioners proceeding under the powers of sub section 1 It is, I think, apparent that the Special Commissioners are bound if they can to adopt the methods provided by the succeeding sub sections, and so I think indeed they have done They have sent a notice requiring particulars in the only way available to them, *viz*, by post, and it is admitted that that notice was received The next step lay with the appellant and he made no return, and I agree that the penalty section is inapplicable For the appellant is not subject to the jurisdiction of the English Court, nor has the British Parliament power to enjoin him personally to do anything

"Then comes sub section 5 I think that he failed to make a return, for I read 'failure' in the sense of '*de facto* did not make' not in the sense of 'contrary to law did not make' Accordingly, I think the Special Commissioners were authorised to make an assessment according to the best of their judgment But quite apart from that I think that under section 1 they were entitled to assess I lay stress on that for this reason It might have been that the notice never reached him I think that the Commissioners would still have been entitled to assess, but the difference would have been that if and when the appellant came to know of the assessment made he would have been absolutely entitled to be heard as to the amount, and, if necessary to get it altered under the powers conferred on the Commissioners by sub section 7, whereas when there has been failure by a person who is bound to furnish the notice under sub section 3, I imagine that there is no absolute right on the part of the person assessed to have the assessment altered although I doubt not, as the object of the Act is to tax people justly and not unjustly, that the Commissioners would even then be ready to consider the question of the amendment of an assessment quite unjust as to amount . "

Per *Lord Wrenbury*—" There was sent to the appellant by post addressed to him in the United States a notice under section 7 (2) requiring him to make a return It is contended that there was no right to post him such a notice so addressed The case it is contended, is similar to the case of service of a writ out of the jurisdiction I do not

(23) 2 Tax Cases 89
(24) 20 Q B D 753

the jurisdiction, and it may be—though on this I express no opinion—that it binds a British subject resident abroad But it is difficult to believe that the Legislature of this country can have intended to impose such a duty upon a subject of a foreign country resident and being in that country, whether he is or is not chargeable to super tax here The difficulty is increased when it is noted that by sub section (3) of the same section (section 7 of the Income tax Act, 1918) it is made the duty of every person chargeable with super tax to give notice to the Special Commissioners that he is so chargeable—an enactment which is surely inapplicable to an alien resident and being out of the jurisdiction, who cannot be assumed to have any knowledge of our law, and that by sub section (4) any person who without reasonable excuse fails to make any return or to give any notice required by the section is made liable to an immediate and a continuing penalty But what right such a penalty could even in express terms be imposed upon an alien resident and being abroad, it is not easy to understand, and it appears to me that sub sections (2) and (4) cannot have been intended to apply to such a person Now the power given by sub section (5) to the Special Commissioners to make an assessment to super tax 'according to the best of their judgment' is contingent on failure' to comply with the obligation to make the return under sub section (2), and I see no escape from the conclusion that where no such obligation exists, there can be no such 'failure' to comply with it and accordingly that in such a case an assessment under sub section (5) cannot be made . .

" When a notice is sent by post, the postal authorities aré only the agents of the sendor to deliver the notice The position is the same as if the sender—in this case the Special Commissioners—had sent a messenger abroad to serve the notice there upon the appellant, in person and if (as I hold) personal service of the notice in this case could not have been effectively made upon the appellant in New York, it follows that the service by post was equally ineffective The regulation cannot alter the construction of the Act or enlarge the Commissioners' jurisdiction (see Lord Davey in *Barraclough* v *Brown*)[22] If the machinery provided for assessment is not applicable to the case, then there is no power to tax

' It appears to me that the whole statute is framed on the basis that direct assessment, whether to income tax, or to super tax, can only be made upon persons who are or reside in this country or on representatives in this country of persons who reside abroad, and that if it is desired to have effective machinery for charging with super tax an alien resident and being abroad who has no representative here, that machinery must be provided by an amendment of the statute "

Per *Lord Dunedin*—" It is here that I part company with the noble and learned Lord Chancellor Holding that sub sections 2, 3 and 4 setting forth the request for and the making of the return of income from all sources are inapplicable to an alien non resident in the United Kingdom he concludes that where no return has been made

(22) L R (1897) A C 615, at p 624

there can be no failure in the sense of sub section 5, and that accordingly no assessment can be made. My Lords, I cannot help feeling, with the utmost respect, that that is tantamount to making liability dependent on failure to make a return, and yet *ex hypothesi* a liability is already established But my real reason for differing from my noble and learned friend is that I look on these sub sections as mere aids to the Special Commissioners in their task, and not as conditions of their power That power is, to my mind, conferred by sub section 1 As in the cases of *Tischler*[23] and *Werle*,[24] it was held that the power given to charge a resident abroad in the name of a person acting on his behalf in the United Kingdom did not prevent a direct assessment on that person if he was in effect found in the United Kingdom, so by analogy I think that a failure of some of the provisions of the succeeding sub sections to fit a particular case does not prevent the Special Commissioners proceeding under the powers of sub section 1 It is, I think, apparent that the Special Commissioners are bound if they can to adopt the methods provided by the succeeding sub sections, and so I think indeed they have done They have sent a notice requiring particulars in the only way available to them, *viz*, by post, and it is admitted that that notice was received The next step lay with the appellant, and he made no return, and I agree that the penalty section is inapplicable For the appellant is not subject to the jurisdiction of the English Court, nor has the British Parliament power to enjoin him personally to do anything

"Then comes sub section 5 I think that he failed to make a return, for I read 'failure' in the sense of '*de facto* did not make' not in the sense of 'contrary to law did not make' Accordingly, I think the Special Commissioners were authorised to make an assessment according to the best of their judgment But quite apart from that I think that under section 1 they were entitled to assess I lay stress on that for this reason It might have been that the notice never reached him I think that the Commissioners would still have been entitled to assess, but the difference would have been that if and when the appellant came to know of the assessment made, he would have been absolutely entitled to be heard as to the amount, and, if necessary to get it altered under the powers conferred on the Commissioners by sub section 7 whereas when there has been failure by a person who is bound to furnish the notice under sub section 3, I imagine that there is no absolute right on the part of the person assessed to have the assessment altered although I doubt not, as the object of the Act is to tax people justly and not unjustly, that the Commissioners would even then be ready to consider the question of the amendment of an assessment quite unjust as to amount . "

Per *Lord Wrenbury*—" There was sent to the appellant by post addressed to him in the United States a notice under section 7 (2) requiring him to make a return It is contended that there was no right to post him such a notice so addressed The case it is contended, is similar to the case of service of a writ out of the jurisdiction. I do not

(23) 2 Tax Cases 89

(24) 20 Q B D 753

agree It is similar rather to the service of a notice of dishonour of a bill or of a notice to quit or of a notice requiring payment of calls upon shares as a preliminary to forfeiture in default of payment It is not a step in a judicial proceeding but a step which will create *inter partes* a state of things in which judicial proceedings can subsequently be taken in default of compliance I think the notice was duly served In my opinion *Inland Revenue Commissioners v Hunt*[95] was rightly decided

Section 7 sub section (1) is self contained and imperative Section 4 has imposed a charge Section 7 (1) has imposed upon the Special Commissioners the duty of assessing the amount Sub sections (2) to (5) do no more than supply machinery for giving effect to sub section (1) But there are no words to the effect that if that machinery is inapplicable to the particular case the duty in sub section (1) shall fail to exist and shall not be performed Under section 7 sub section (3) it is the duty of every person chargeable with super tax to give notice that he is chargeable If therefore I am right in thinking that the non resident alien is chargeable in respect of property in the United Kingdom it was his duty to give that notice and whether he performed that duty or not and whether the notice addressed to him out of the United Kingdom was duly served or not it remains that section 7 sub section (1) stands as a statutory duty which the Special Commissioners must discharge to the best of their ability leaving the party assessed to his remedy if he is in a position to prove that the assessment made upon him is excessive The power of the Commissioners to assess in default of a return is not an exclusive power to assess Their power and duty to assess arises not only in the case in which the tax payer makes default but because sub section (1) gives them power to assess and imposes upon them the duty to do it If (but for this point) the liability exists I am unable to agree in the view that the liability is non existent if it be found that the machinery provided by the Act does not fit the case

Per *Lord Phillimore* — But if I find that the procedure is inapplicable this will be a strong reason for supposing that Parliament did not intend to tax this class with this tax.

If a non resident and especially a non resident alien should be minded to come to this country for the purpose of visiting the Exhibition at Wembley would it not be monstrous if he were suddenly prosecuted for this penalty? It seems to me no answer to suggest that in the circumstances the penalty imposed would be a nominal one He would have been treated as a law breaker It is only when there is a failure or an unsatisfactory return that they are enabled to make an assessment according to the best of their judgment Failing the condition precedent they have no jurisdiction But I am sure that it is not the duty of a non resident and undomiciled alien to know them

(95) (1923) 2 K B 563 8 Tax Cases 466

In the *Bombay Trust Corporation case*,[25a] the Bombay High Court queried, in passing, whether the above ruling can be followed in this country It would seem however that the position of the Crown in British India is even stronger inasmuch as the principal ground of the dissentient judgments in the above House of Lords case, *viz*, that the assessee has in some cases under the United Kingdom law to give notice himself and that an alien is not expected to know the Municipal laws of another country, is absent in India Except in the case of a principal officer of a company, no return need be furnished by a person unless the Income tax Officer has called for it, and if the Income tax Officer's notice did not reach the assessee, he can avail himself of section 27 and demand a fresh assessment And if for any reason he is unable to avail himself of section 27, he can ask the Commissioner to consider in revision his case under section 33 Thus the assessee has ample remedies

There seems also to be nothing in the Indian Income tax Act to prevent the decision in the *Whitney* case being followed in India A non resident (British subject or foreigner) can be taxed with reference to income accruing in India and the fact that he has or has not an agent in British India does not affect the question[26] Sections 3 and 4 which impose the tax do not distinguish between aliens and British Indians Section 22, subsection (2), under which an Income tax Officer has to serve a notice upon a person likely to be liable to tax requiring him to furnish, within the prescribed period, a return in the prescribed form, does not, equally with the section in the English Act on which the *Whitney* ruling was based, restrict it to any person resident within British India On this matter there is no difference between section 7 of the English Income tax Act, 1918, and the Indian Act Therefore under section 22 a return can be asked for from the non resident person liable to income tax Sub-section (4) of section 23 is also general in its terms, and therefore, under that sub section, an assessment can be made if the non-resident person fails to submit a return The same remark applies also to section 29 which deals with notice of demand

As to the mode in which such notices are to be served on a non resident person, section 63 provides that a notice under any of the sections specified above can be served on the person therein named either *by post or as if it were a summons issued by a Court under the Code of Civil Procedure* Under Order [illegible]

(25-a) 3 I T C 135

(26) *Commissioner of Income tax v Bhanjee* I L R 44 Mad [illegible] L J 191, and other rulings under section 42

25 of the Code of Civil Procedure a notice can be served on a person residing outside British India who has no agent in British India empowered to accept service, by addressing the summons to the place where he is residing and sending it to him *by post* if there is postal communication between such place and the place where the Court is situate That being so, both under the first part of section 63 (1) and under Order 5, Rule 25, notices calling for the returns can be sent *by post* to the person to be assessed As to the officer who is to send such a notice and assess, section 64 will apply

The main point, of course, is that what determines the liability is the nature of the income, and that, once the income is liable to tax there is nothing to prevent the Crown taxing the income if it can reach it after giving a reasonable opportunity to the assessee It is not the giving of such opportunity to the assessee—which is what the service of a notice means—that determines the liability to tax, but the fact that the income accrues or arises or is received or is deemed to accrue, etc, in British India

Legality of notice under section 22 (4) not affected by subsequent action of Income-tax Officer—

An Income tax Officer called for the accounts of the earlier years under section 22 (4) The assessee failed to produce them and the Income tax Officer made the assessment under section 23 (4) When the assessee moved the Income tax Officer to reopen the assessment under section 27, the Income tax Officer refused and in doing so stated incidentally that he had required the earlier accounts in order to make a supplementary assessment under section 34 The notice that he issued under section 22 (4), however, did not state this purpose The assessee appealed to the Assistant Commissioner against the Income tax Officer's order under section 27 The Assistant Commissioner, who rejected the appeal, observed that the Income tax Officer required the earlier years' accounts not only to take steps under section 34 but also to verify the opening balances of the accounts of the current assessment It was argued on behalf of the assessee that no preliminary notice having issued under section 34, the Income tax Officer could not call for the earlier accounts for the purpose of a supplementary assessment and that the Income-tax Officer's assessment under section 23 (4) for failure to produce accounts under section 22 (4) was illegal

Held, that the fact that the Income tax Officer afterwards gave to the assessee a reason which would not justify his action in calling for the earlier accounts did not make his action

unjustifiable or illegal, nor did it make the failure of the assessee to produce those accounts an insufficient basis for an arbitrary assessment under section 23 (4) [27]

Power to seize books—Not allowed—

An Income tax Officer went to a factory to inspect the accounts where he met the sons of the proprietors A & B A gave the Income tax Officer some of the books that he wanted While the Income tax Officer was leaving with the books, B wanted the books back The Income tax Officer was willing to return the books but wanted A to put in an application asking for extension of time for producing the books To this B demurred Thereupon the Income tax Officer wrote out a notice under section 37, and served it on A and B, but they refused to receive it B then attempted to recover the account books forcibly from the Income tax Officer's orderly who was keeping them The Income tax Officer at once sent for the Police, and warned B that he was obstructing a public servant in the discharge of his duties B then forcibly ejected the Income tax Officer who had refused to go out B was prosecuted under section 99, Indian Penal Code *Held,* that although under section 22 (4) of the Income tax Act, the Income tax Officer can serve a notice calling upon the assessees to produce the accounts, he had no power to insist on the production of accounts in the event of non compliance beyond what he can do under section 23 (4), that is, to assess according to the Income tax Officer's judgment and deprive the person of the right of appeal By remaining in the premises after he had been asked to go away, the Income tax Officer was guilty of trespass, and inasmuch as he was not acting in good faith under colour of his office section 99, Indian Penal Code, did not deprive B of the right of self defence [28]

Previous law—

Under the 1886 Act, while there was an obligation on the principal officer of a company to furnish a return, there was no similar obligation on the part of individual assessees to furnish returns All that the Collector could do was to invite returns from such persons if the Local Government had so authorised him by Rules The power to call for returns was first given by the Amending Act of 1916

As regards the demand for the production of accounts, the Income tax Officer had, under the 1918 Act, to call for the

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(27) *Kandasuami Pillai and Ramaswami Serai v Commissioner of Income-tax Madras* (Unreported.)

(28) *Achhru Ram and others v The Crown,* 7 Lah 104

accounts in every case in which he did not accept the return of the assessee Now, he is not bound to do so Further, under the 1918 Act, the accounts could be called for only if the return was not accepted by the Income tax Officer If no return had been filed the accounts could not be demanded Now, however, the accounts can be called for at any stage, and whether the return has been filed or not But see notes under section 23

Sub section (3) is new and was introduced in 1922

United Kingdom Law—

In the United Kingdom, the accounts of the assessee can not be demanded, nor is there a penalty for not producing the accounts All that he can be asked to do is to produce evidence in support of his return (section 139 of the English Income tax Act of 1918) and if such evidence is not produced though available there would be the usual presumption against the assessee

Assessment

23 (1) If the Income-tax Officer is satisfied that a return made under section 22 is correct and complete, he shall assess the total income of the assessee, and shall determine the sum payable by him on the basis of such return

(2) If the Income-tax Officer has reason to believe that a return made under section 22 is incorrect or incomplete he shall serve on the person who made the return a notice requiring him, on a date to be therein specified, either to attend at the Income-tax Officer's office or to produce, or to cause to be there produced, any evidence on which such person may rely in support of the return

(3) On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on specified points, shall, by an order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment

(4) If the principal officer of any company or any other person fails to make a return under sub-section (1), or sub-section (2) of section 22, as the case may be, or fails to comply with all the terms of a notice issued under sub-section (4) of the same section or, having made a return fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment [29][and, in the case of a registered firm, may cancel its registration

Provided that the registration of a firm shall not be cancelled until fourteen days have elaped from the issue of a notice by the Income-tax Officer to the firm intimating his intention to cancel its registration]

History—

Regarding the changes made in 1922, *see* All India Income tax Committee's Report, 1921, and the Statement of Objects and Reasons of the Bill as introduced in 1921—both of which are to be found in the Appendices

The proviso to sub section (4) and the power to cancel the registration of a firm owe their origin to the Amendment popularly known as the "Bogus Companies and Firms Act"

Evidence in assessment proceedings other than returns and accounts of assessee—

In addition to his general power to call for accounts the Income tax Officer where he believes that a return made under section 22 (2) is incorrect or incomplete has power to call upon an assessee to attend or to produce or cause to be produced evidence of the correctness of his return If an assessee fails when required by an order under section 23 (2) to attend or to produce evidence in support of his return he is not liable to any penalty under section 51 but failure to comply with such orders has the result of placing the assessee in exactly the same position as a person who failed originally to make a return [*see* section 23 (4)] that is he may not appeal against the order of assessment or take any action other than action under section 27

Under section 23 (3) the Income tax Officer is empowered to utilise any evidence bearing on the assessment which he may obtain of his own motion while under sections 37 and 38 he can enforce the attendance of any person for this purpose and compel the production of the information that he requires

(29) Inserted by the Income tax (Amendment) Act, 1930 (XXI of 1930)

The following special instructions should be observed in calling for information from railway administrations —

(i) The information must be relevant to an individual assessment Income tax Officers should not for instance ask for a complete statement of all consignments to or from a particular station

(ii) The demand for information must be couched in definit terms For instance it must state whether the particulars are required with regard to outgoing or incoming consignments and name the stations with regard to which the information should be collected

(iii) The requisition for information should always be sent to the Agent of the Railway administration concerned There is no objection however to Railway officers furnishing information direct to the income tax authorities without the intervention of the Agent where the Agent has no objection to their doing so

Section 37 gives power to call for railway books

Except as provided in section 19 A and Rules 42 and 43 a company should not be required to furnish the Income tax Officer with a return of the persons (with their addresses) for the time being appearing on the share register of the company and the amounts of the dividends paid or payable to such persons during any particular period Such a duty would be burdensome to the company with no corresponding advantage to the administration It is for this reason that in section 39 of the Act provision is made that the share register the register of debenture holders and of mortgagees of any company are open to the inspection of the income tax authorities who may also take copies or cause copies to be taken of any entries in such registers Since the power to inspect and take copies of such register is specifically conferred by section 39 no income tax authorities utilising these special powers can be called upon to pay any fee for inspection or copies under the Companies Act

The Bill as originally framed contained a provision empowering an Income tax Officer to require information to be given regarding specific payments shown in the accounts of an assessee where there is reason to believe that such payments will become liable to tax in the hands of the recipients This particular provision was omitted by the Select Committee on the Bill as being entirely unnecessary because Income tax Officers have ample powers to disallow any payment shown in the accounts of an assessee where proof of the payment is not forthcoming

Section 37 also provides for the issue of commissions The scale of diet money any travelling expenses for witnesses summoned under this section should be that prescribed for attendance in civil courts in the Province concerned (*Income tax Manual*, para 70)

Sub sections (2) and (3)—Scope of—

The scope of section 23 (2) and (3) was examined in *In re Lachman Das Narain Das of Cawnpore*[30]

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(30) 2 I T C 1

Per *Walsh C J*— For my own part I have no doubt and I am confirmed by my examination of the other provisions of the Act that the other evidence which the Income tax Officer may require on specified points under sub section 3 of section 23 is evidence which he may require from the assessee and of which he may give him notice specifying the points and requiring its product on It seems to me that this interpr tation enables the machinery to worl smoothly and naturally and any other interpretation works difficulty There is no doubt that the enquiry contemplated by section 23 is an enquiry such as that which the appellat Court under section 31 may direct the Income tax Officer to hold or may himself make during the hearing of the appeal It is deemed to be a judicial proceeding and the Income tax Officer has the same power as a court under the Civil Procedure Code when trying a suit to enforce the attendance of any person and to compel him to give evidence on oath to compel the production of witnesses and of documents and to examine witnesses on commission So that he has all the powers of a Judge in a suit so far as concern witnesses and documents This gives him ample facilities for securing information and guidance from rivals in the trade of the assessee or experts or past employees or managers acquainted either with the particular business of the assessee or the class of business in the neighbourhood—and no further provision is required in any other part of the Act to vest that power in him Section 37 is comprehensive and adequate If sub section 3 of section 23 gave power to the Income tax Officer to summon further evidence himself it would be tautologous It would be merely repeating in inconvincing and inadequate form what is expressly provided by section 37 In my view the matter is simple and clear When the day is appointed and the notice requiring the assessee to attend and produce evidence and so forth at the enquiry has been complied with up to that point there has been no default under sub section 2 If the assessee makes default under sub section 2 by fail ing to attend or failing to produce evidence then undoubtedly the Income tax Officer may and indeed has no option but to do his best under sub section 4 But in this imperfect world especially with businesses difficult to understand for any one who has not been specially trained occasions must often arise when the evidence produced before a tribunal falls short of giving the Income tax Officer full and complete satisfaction In this case for example the assessee might have said the wastage i abnormal I admit it The fact is that our machinery is worn out It has given great trouble this year and partly on that account the wastage has been excessive and our profits much diminished The obvious course for the Income tax Officer would be to say I was not aware of that and if you satisfy me on that point I shall be prepared to accept your claim of wastage but before I do that I require you to produce further evidence about the machinery He may then adjourn the enquiry fix a fresh date and in order to prevent mistake require by a fresh notice the assessee to produce other evidence on the specified point namely on the defect which had appeared in the machinery on such adjourned date As my brother pointed out during the argument sub section 2 does not confine the Income tax Officer to one notice and such

further notice if given would become a notice under sub section (2) The evidence if produced, would be other evidence such as the Income tax Officer has required on specified points, and having obtained it he can then assess under sub section 3 If the assessee chooses not to produce the further evidence on those specified points, then the Income tax Officer is thrown back on to sub section 4, just as he is if the assessee has failed to produce any evidence in the first instance, and this view which seems to me to work, as I have already said, quite easily and to do justice to all parties, derives confirmation from the fact that an order under sub section 4 of section 23 is unappealable, in other words, an assessee who is so obstinate, or fraudulent, that he will not assist the Income tax Officer by removing these difficulties and tendering further evidence on specified points is not only penalised at possibly a figure higher than the true figure, but is also deprived of the right of appeal, which is given to those who try their best even though the tribunal *does not accept their* views "

Dalal, J — ' The applicant desires us to hold that the Income tax Officer could hear evidence only of witnesses produced by him while the Income tax Commissioner expresses alarm in case this Court held that by the word 'require in this clause is meant 'require from the assessee' The Commissioner enquires how a fair assessment is to be made if the Income tax Officer is confined to hear evidence produced by the assessee only and not any other evidence This clause however is to be read with the rest of the Act and it does not take away the power of the Income tax Officer to call for and hear evidence under the powers he has under section 37 of the Act The only difference between clause 3 and clause 4 is that in cases falling under clause 3 he is to arrive at an assessment to the best of his judgment on the evidence before him while under clause 4 he is to decide in the absence of evidence "

As suggested in Walsh, C J 's judgment above, the words "such other evidence as the Income tax Officer may require" in section 23 (3), simply refer to any evidence that the Income tax Officer may call for under section 22 (4) or section 23 (2), or section 37 Section 23 (3) does not, of itself, confer on the Income tax Officer any power to call for evidence, and that is why —(*a*) No form has been prescribed for a notice calling for the production of evidence under section 23 (3), (*b*) No special penalty apart from that prescribed under the Civil Procedure Code has been prescribed for failure to comply with such a notice

If the Income tax Officer requires further evidence, he should apparently give reasonable time to the assessee according to the circumstances of each case and also specify the evidence

Person wrongly described in notice—

A person who was the Manager of a Pharmacy was served with a notice under section 22 (2) addressed to him as Proprietor of the Pharmacy He made no return, and the Income tax Officer

assessed him under section 23 (4) Instead of following the remedies open to him under the Income tax Act, the assessee sued the Crown *Held*, that a suit was barred by section 67 of the Income tax Act and that a mere error of description in the notice was not a good excuse for not submitting a return or for invalidating the assessment made[31]

Personal attendance of assessee—

While section 23 (2) empowers the Income tax Officer to require a person making a return to attend at his office, under the provisions of section 61 any person required or entitled to attend before any income tax authority may either attend in person or be represented by a person duly authorised by him in writing The penalty to which an assessee who failed to attend when required to do so by an Income tax Officer was liable under the Act of 1918, has been omitted from section 51 of the present Act While there is no obligation on an assessee to attend in person at any stage of the assessment proceedings or before any income tax authority in connection with any proceedings under the Act and while he may be represented at any such proceedings by any other person he pleases to authorise in writing failure to attend *or* to be so represented has the result that the assessee loses any right of appeal against the assessment

It should however be particularly noted that the provisions of section 61 merely refer to attendance Returns and verifications required under the Act must be signed either by the assessee himself or by any duly authorised person

It is desirable that tax payers should be allowed to use whatever agency they please for the purpose of representing their case and whatever person they authorise to represent them, whether he be an employee, an accountant or any other person, has presumably been selected by them as the person having the best knowledge of their accounts and financial position and such person is entitled to appear before any income tax authority and to give explanations and produce evidence regarding any points of doubt that may arise (*Income-tax Manual*, para 71)

Under sub section (2) of section 23 an assessee cannot be asked *both* to attend *and* to produce the evidence

Adjournments—

Though words similar to those in section 31 (1) in which it is stated that the Assistant Commissioner "may from time to time adjourn the hearing" do not appear in section 23 (3), it is clear from the words "as soon after as may be" that the Act contemplates the adjournment of hearing by the Income tax Officer Apart from these words, the power of adjournment is so necessary, convenient and universally conceded that unless it is expressly withheld by statute or rule having the force of law

(31) *Dr R Singla v Secretary of State*, 2 I T C 462

it must be taken to vest in him It is not possible to regard a question of this kind apart from considerations of practical expediency in its relation to the transaction of public business

It is not the practice—much less a rule of procedure—even in a court of justice that an adjournment date is intimated by post to an absent party It is for him to take steps to ascertain the date If an assessee does not appear or produce the evidence on the specified date in response to a notice under section 23 (2), it is open to the Income tax Officer to assess under section 23 (4) He is not bound to make an adjournment And if he makes an adjournment, it is merely an act of consideration and supererogation on his part to inform the assessee by post of the adjourned date Failure to give such instruction would entail no legal consequences The intimation is not a notice or requisition under the Act and need not therefore be sent by registered post as required by section 63 If such a view were not taken, no Income tax Officer would grant any adjournments to suit the convenience of assessees

A party summoned to appear should go on appearing till his case is finished Otherwise an assessee might merely go to the Income tax Office, fling his books down before the Income tax Officer and then walk away [32]

Order of assessment—Free of charge—

When an assessment order has been passed under section 23, any assessee who applies to the Income tax Officer for a copy of the order must be supplied by the Income tax Officer with a copy free of charge (*Income tax Manual*, para 73) All that this means is that no copying fees should be levied and not that such court fees or other stamp fees that may be leviable under the law should be remitted As regards Stamp fees and Court fees payable in connection with proceedings under the Income tax Act, *see* the introduction, p 58 *et seq*

Firm—Notice—May be served on any partner—

In the case of a firm, the notice under section 23 (2) is not bound to be served on the same partner as made the return Under section 63 (2), it is open to the Income tax Officer to serve notice on *any* partner of the firm [33]

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(32) *Peranna Pillai v Commissioner of Income tax Madras* 4 I T C 217

(33) See *Commissioners of Income tax Madras v Thillai Chidambaram* ... 2 I. T C 27, 48 Mad. 602

Onus of proof—

In In re *Bishnu Priya Chowdhurani*,[34] an assessee who submitted a verified return of income stated that he derived no income from a particular source The Income tax Officer asked him to prove this negative statement, and in the absence of such proof the Income tax Officer assessed him on income from that source without otherwise satisfying himself that he had such income, and also on an arbitrarily estimated basis On appeal, the Assistant Commissioner also required the assessee to prove that he had no income from that source, and in the absence of such proof the assessment was confirmed Two questions arose in this case—to quote the words of the Commissioner of Income tax in his reference to the High Court—

(1) Whether in the absence of other reliable data as to the income of an assessee from a certain source an Income tax Officer is justified in making and an Assistant Commissioner in upholding an assessment based on a formula which has been found in practice generally applicable in similar conditions to incomes from that source and (2) whether an assessee having in a verified return of income stated that he derived no income from that source can be required by an Income tax Officer to prove that statement whether in the absence of such proof the Income tax Officer is legally justified in assessing him on income from that source without otherwise satisfying himself that he has such income whether on such an assessment being made and an appeal being filed against it an Assistant Commissioner can require the assessee to prove his negative assertion and whether in the absence of such proof, he is legally justified in confirming the assessment

The first question was not considered at all by the High Court and on the second question the High Court simply agreed with the Commissioner who held as below —

The question stated admits in my opinion of but one answer The ordinary principle of evidence applies and the burden of proof is on the party which would fail if no evidence were produced i e on the officers of the Income tax Department The latter cannot proceed on general assumptions to reject an assessee s verified assessment If an assessee states that he has no income from a certain source and the officers of the department disbelieve him it is for them to prove that he has some such income and not for him to prove the reverse Any assessment based on the inability of the assessee to prove his negative statement and on general assumptions only is bad and should be cancelled

The assessment was accordingly cancelled With great respect, however, it is submitted that the Commissioner's view was wrong The Income tax Officer has no onus to discharge He is not a party to a cause of action, and it does not seem correct

(34) 60 Cal. 901, 1 I T C 261

therefore to suggest that the ordinary law of evidence (whatever is meant by that expression) applies Even in regard to confiscations and penalties made, for example, by Customs Officers, it has been held that all that an officer need do is to give the person affected ample opportunity to correct or contradict any evidence or statement on record on which it is proposed to act The officer need only act on general principles (of justice)—not necessarily legal principles, and need not adjudicate on a penalty or confiscation as though he were a Court guided by the Code of Civil or Criminal Procedure (*Mahadeo Ganesh* v *Secretary of State*) [35] What the Income tax Officer ought to do is to give the assessee a reasonable opportunity of rebutting the presumptions which the Income tax Officer makes against him In this particular case, the assessee might have been in a position to disprove the Income tax Officer's assumption by producing settlement records, and, if so it was his duty to have done so The position, however is necessarily different if the facts are such that the assessee cannot reasonably be called upon to prove a negative—not being in a position to do so—but in such cases, the Income tax Officer should give the assessee some idea of the evidence or information on which he—the Income tax Officer—proposes to assess and give the assessee a chance of rebutting that evidence

In *Bhikaji Dravid* v *Commissioner of Income tax*[36] the Judicial Commissioner of Nagpur held that the verification of the return and the assessee s statement on oath are not in themselves sufficient to discharge the onus resting on the assessee to prove the correctness of his return, especially if there are entries in the accounts requiring further explanation

Whether the decision in the case of *Bishnu Priya Chaudharani* was right or wrong, there is a lot of difference between asking a person to prove that he had no income and asking him to prove his alleged losses Once income has been admitted to exist the burden of proving losses is on the assessee [37]

When an assessment is made by Commissioners, the burden is upon the person disputing it to displace it, not on the person making it to sustain it [37a]

Indian Evidence Act—Applicability of—

Under section 3 of the Indian Evidence Act (I of 1872), a Court includes all persons except arbitrators legally authorised to take evidence In view of section 37 of the Income tax Act,

(35) 46 Bom 3

(36) 103 I C 38

(37) *Ragunath Das Ramjratap* v *Commissioner of Income tax C P*; *Radha Kisan Ramnarain* v *Commissioner of Income tax C P* 3 I T C 366

(37-a) Per Scrutton L J in *Belfour* v *Mace* 13 Tax Cases 539

therefore, Income tax Officers, Assistant Commissioners and Commissioners are all a 'Court' *See also* the notes under section 52 But the Evidence Act applies only to "all judicial proceedings in or before any court" The question therefore arises whether the proceedings before the abovementioned officers under the Income tax Act are 'judicial proceedings' There is no general definition of the expression 'judicial proceedings' According to the Criminal Procedure Code, section 4 (1) (24), 'judicial proceedings' include any proceedings in the course of which evidence is or may be legally taken on oath Just as in section 37 of the Income tax Act, proceedings before various Revenue Officers have been specially declared in various Acts to be 'judicial proceedings' for the purpose of sections 193 and 228 of the Indian Penal Code Whether, from the fact that proceedings before the officers of the Income tax Department have been specially declared to be 'judicial proceedings' only for the purpose of sections 193 and 228 of the Indian Penal Code, it is a reasonable inference or not, on the principle of *expressio unius est exclusio alterius* to hold that for other purposes, such proceedings are not 'judicial proceedings , there seems to be little doubt that the detailed provisions of the Evidence Act will not apply to such proceedings automatically and without qualification Obviously, the same person cannot be party judge and witness Nor can the applicability of the Evidence Act conceivably arise when the Income tax Officer has perforce to assess under section 23 (4) to the best of his judgment the assessee not having complied with the requirements of the Income tax Officer Similarly, beyond the limited provisions referred to in section 37, the provisions of the Civil Procedure Code also will not apply to proceedings before Income tax authorities

The general principles of how inferences may be drawn will however apply The presumption to be drawn from the non production *of account books by an assessee who keeps them* will be governed by section 114 of the Evidence Act Ordinarily, the inference will be that the books if produced will go against the assessee[38]

The general scope of sections 22 and 23—

Under sub section (1) of section 23, if the Income tax Officer is satisfied that the return made under section 22 is correct and complete, his obvious duty is to assess the total income of the assessee in accordance with the return He cannot ask for (why should he?) further information If, on the other hand,

(38) *Sankaralinga Nadar v Commissioner of Income tax Madras* 4 I T C 6

the Income tax Officer has reason to believe that the return made under section 22 is either incorrect or incomplete, he shall serve on the person who made the return a notice as required by sub-section (2) of section 23 It will be seen that the Income tax Officer has no discretion in the matter He must issue a notice if a return has been sent in, and if he is not prepared to accept it as it stands See *Nirmal Kumar Singh v Commissioner of Income tax*[39] in which, however, there are *obiter dicta*, Greaves, J, suggesting that this notice could be waived if the assessee had equally adequate opportunity to substantiate his return As to the circumstances in which a return sent in by an assessee is not a valid return, *see* below There is no prescribed form for this notice under section 23 (2) but it should specify the date on which the person who made the return should attend or produce or cause to be produced the evidence on which such person may rely in support of his return Any number of notices can be issued under section 23 (2) See In re *Lachmandas Naraindas*[40] The provisions of sub-section (2) of section 23 will be complied with if the Income tax Officer asks the assessee to show cause why he should not be assessed at a particular figure and on a particular basis[41] Under section 23 (3), the Income tax Officer should, on a specified date or as soon as possible afterwards, hear such evidence as the person may produce The Income tax Officer is not precluded from calling for further evidence from the person who made the return in regard to specified points Such evidence as has not been called for under section 23 (2) or under section 22 (4) should be called for by the Income tax Officer under section 37 After hearing both the evidence called for on the specified points and the evidence produced by the person who made the return in support of his statements, the Income tax Officer shall assess the total income of the assessee and determine the amount payable by him as tax on the basis of this assessment This order must be in writing It is subject to appeal, and should therefore be, ordinarily speaking, a reasoned order The Income tax Officer, however, is not a party to a suit and has no onus to discharge It is therefore unnecessary for him to adduce any evidence in the strict sense of the Indian Evidence Act in support of his conclusions But there must be convincing reasons given to justify his conclusions if they differ from the evidence produced by the assessee, whether

(39) 2 I T C 20
(40) 2 I T C 1
(41) *Nemchand Magniram v Commissioner of Income-tax, B and O.*, – I T C 146

of his own accord or at the instance of the Income tax Officer And the assessee should ordinarily have an opportunity of rebutting, if possible, the evidence or the grounds on which the Income tax Officer proposes to assess him As already stated the ordinary law of evidence as between parties to a suit cannot apply as between the Income tax Officer and an assessee

Different views have been held, as will be seen below, as to whether the issue of a notice under section 23 (2) precludes *an Income-tax Officer from issuing a notice under section 22 (4)* also, and whether a notice under section 22 (4) can be issued in cases in which a return has been submitted But if a notice under section 22 (4) has been issued before the assessee's return was received by the Income tax Officer, and if the Income tax Officer is unable to accept the return as it stands, it is still obligatory on his part to issue a notice under section 23 (2) notwithstanding the fact that a notice under section 22 (4) was pending or had not been complied with In other words, notice under both sections 23 (2) and 22 (4) is not obligatory in all cases The former is obligatory in all cases in which a return is received and not accepted, as it stands, by the Income tax Officer, but the latter notice is optional and may be issued irrespective of whether a return has been submitted or not[42] In the notice under section 22 (4), an Income tax Officer should specify what evidence he requires, and such evidence must be confined only to accounts and documents Further the accounts should not relate to a period more than three years prior to the previous year If he wants to hear oral evidence on any point on which the assessee does not adduce any evidence himself, the Income tax Officer would have to invoke his powers under section 23 (3) read with section 37. In a notice under section 23 (2), on the other hand, it is left entirely to the assessee to determine what evidence he should adduce There is nothing, however, to preclude an Income tax Officer from issuing a notice under section 23 (2) specifying the points on which he wants the assessee's written evidence, if the Income tax Officer is in a position to do so, in fact, such specification would help both the Income tax Officer and the assessee if only it was possible But it is usually difficult for an Income tax Officer at this stage to specify what he wants as he would perhaps have to call for the assessee's entire accounts, etc See, however, the remarks of Mookerjee, J, in *Nirmal Kumar Singh v. Commissioner of Income tax*[43]

(42) *Ka Hassendas Bagri v Commissioner of Income tax, Bengal,* 2 I T C 325, *see also* 3 I T C 290 and connected rulings.

(43) 2 I T C 20

An Income tax Officer is not bound to make up his mind the moment he receives a return as to whether he accepts it or not It is open to him before he deals with the question to call for the production of accounts, and as the accounts have to be proved by somebody, to call upon the assessee to appear in person If the assessee appears but does not produce the accounts, the penalty under section 23 (4) is automatically attracted, and no further notice under section 23 (2) is required[44]

Res Judicata—

An Income tax Officer is not a Court except for the purposes mentioned in section 37 In re *Nataraja Iyer*[45] is not an authority for the position that an Income tax Officer is a Court for all purposes The principle of *res judicata* applicable to the decisions of Civil Courts does not apply to the proceedings of Income tax Officers If a question is referred to the High Court and decided by it, it will of course be binding on the Income tax Department for that particular assessment For later assessments of the same assessee, it will be ordinarily *res judicata* if the answer to the question does not depend on circumstances which vary from year to year, *e g*, whether a certain property is a trust property Otherwise, if the answer to the question depends on facts varying from time to time, it will not be *res judicata* It is not open to the Income tax authorities, however, to re open concluded facts except in accordance with natural justice Where Income tax Officers have after enquiry assessed a particular person on a definite basis, it would not be open to the department arbitrarily to change the assessment, though it would be open to them to go back on the previous basis in the light of fresh facts If there is evidence on which the change in basis is justified, the High Court will not interfere

Commissioner of Income tax, Madras v *Massey & Co Ltd*,[46] and *Sankaralinga Nadar and Bros* v *Commissioner of Income tax*[47] (based on *Hoystead* v *Commissioners of Taxation*[48] and *Broken Hill Proprietary Co* v *Broken Hill Municipal Council*)[49]

(44) *Rm Pl S Sivasami Chettiar* v *Commissioner of Income tax Madras* 4 I T C 207

(45) 36 Mad 72

(46) 3 I T C 302

(47) A I R 1930 Mad 909, 4 I T C [illegible]

(48) 1926 A C 155

(49) 1926 A C 94, see also *Deokinandan and Sons* v *Commissioner of Income tax Delhi* 1 6 I C 786

In *Rai Saheb Lala Jinja Ram v Commissioner of Income-tax, Punjab*,[0] it was held that an Income-tax Officer was not estopped from going back on a decision of his own or that of his predecessors which he considered to be wrong

An Income-tax Officer is not bound to accept the conclusions, in regard to facts, reached by another Income-tax Officer even if on the same facts and at the same time in connection with other assessments and even if indirectly concerning the assessee [0a]

Failure to comply with a notice under section 23 (2) does not involve any consequences beyond bringing the assessee under the operation of section 23 (4) which would deprive him of the right of appeal against the assessment by the Income-tax Officer Failure to comply with notice under section 22 (4), on the other hand, *not only brings the assessment within section 23 (4) but* exposes the person to penalties under section 51, *i e*, a continuing fine of Rs 10 a day

Section 23 (4) can come into operation only if the person—

(1) fails to make a return, or (2) fails to comply with all the terms of the notice issued under section 22 (4), or (3) having made a return fails to comply with all the terms of the notice issued under section 23 (2) And when it comes into operation the Income-tax Officer *must* assess under that sub section and the assessee has no right of appeal *See* section 30

Cancellation of registration of firms—

Proviso to sub section (4) —It is evidently the duty of the Income-tax Officer to consider the objections if any put forward by the firm before cancelling its registration, and to hear the firm or its representative if necessary

No form has been prescribed for the notice All that it need do is to intimate the Income-tax Officer s intention to cancel the registration of the firm and ask it to show cause why the Income-tax Officer should not do so The notice should, like all statutory notices be served in accordance with the provisions of section 63

The rationale of cancelling the registration of a defaulting firm is this The object of registration is to tax partners on their individual incomes If the firm will not help the Income-tax Officer to ascertain its income, there is no point in attempting to tax partners on their individual incomes

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(0) 3 I T C 345

(0a) *L. P M S T Chettyar Firm v Commissioner of Income-tax* 3 I T C 416

Bearing of section 23 (4) on section 22 (4)—

The wording of sub section (4) of section 23 has given rise to much discussion as to when the notice contemplated under section 22 (4) may be issued There had been incidental references to the question in various rulings,[1] in all of which it had been tacitly assumed that the notice could be issued at any stage of the proceedings, irrespective of whether the return had been submitted or not and whether a notice had been issued under section 23 (2) or not In *Brijraj Ranglal*[2] the Patna High Court doubted the correctness of this view and suggested that the absence of the words "having made a return" in the earlier part of sub section (4) of section 23 which refers to the failure to comply with the notice issued under section 22 (4) and the presence of those words in the later part of the sub section which deals with failure to comply with the notice issued under section 23 (2) indicated that the notice could be issued under section 22 (4) only when a return had not been submitted The Allahabad High Court, on the other hand, held in *Lala Chandra Sen Jaini v Commissioner of Income tax*,[3] that a notice under section 22 (4) could be issued at any stage of the proceedings irrespective of whether a return of income had been submitted or not and whether any notice had been issued under section 23 (2) or not The Allahabad ruling was followed by the Calcutta High Court in the case of *Harmukhrai Dulichand*,[4] by the Patna High Court in the case of *Ram Khelawan Ugamlal*,[5] by the Rangoon High Court in the case of *R M P Chettyar Firm*,[5a] and by the Madras High Court in the case of *R M S R M Ramaswami Chettyar*[6] But in the case of *Lachhmandas Baburam*,[6a] Mukerjee, J, of the Allahabad High Court dissented from the above view and a reference was made to a Full Bench who decided that the question did not arise on the facts of the case In *Khushiram Karamchand v Commissioner of Income tax*[7] the Lahore High Court placed a third interpretation on the sections concerned They considered that the primary object of calling for accounts

(1) *Nirmal Kumar Singh v Commissioner of Income tax* 2 I T C 20, *Dhunchand and Dhaniram v Commissioner of Income tax*, 2 I T C 188, *Ramkissandas Bagri v Commissioner of Income tax*, 2 I T C 324, *Radhakishan and Sons v Commissioner of Income tax*, 2 I T C 345

(2) 2 I T C 458

(3) 3 I T C 17

(4) 3 I T C 198

(5) 3 I T C 225

(5-a) 3 I T C 335

(6) 3 I T C 290

(6a) 4 I T C 51

(7) 100 I C 774

and documents under section 22 (4) was to enable the Income-tax Officer to decide whether he would accept the return of income under section 23 (1) or proceed to enquire under section 23 (2) and (3), and that therefore the notice under section 22 (4) should precede and not follow the notice under section 23 (2). The *ratio decidendi* was as follows. Failure to comply with a notice under section 22 (4) involves a summary assessment under section 23 (4) without any right of appeal against the assessment. Similarly failure to comply with the notice issued under section 23 (2) involves a summary assessment. That being so, the Legislature could not have intended that when a man had submitted a return, complied with a notice, if any, issued under section 22 (4) at that stage, and further complied with a notice issued under section 23 (2), he should be exposed to further defaults and the consequent summary assessment depriving him of the right of appeal. It would be ever so easy for an Income-tax Officer to issue a notice under section 22 (4) in the course of an enquiry under section 23 (3) and convert what is really a default under section 23 (3) into one under section 22 (4) and proceed to assess summarily. Failure to comply with the requirements of the Income-tax Officer acting under section 23 (3) read with section 37 does not entail summary assessment under section 23 (4). Therefore, though the terms of section 22 (4) are wide, an interpretation which was more favourable to the subject should be placed on it. This decision, however, left open the question whether the notice under section 22 (4) should precede the receipt of the return or not; all that it has expressly decided is that it may not follow a notice under section 23 (2).

The Lahore High Court held also that a notice could be issued under section 22 (4) in connection with proceedings under section 34 at any stage but did not explain how exactly the distinction arises between proceedings under section 34 and those under section 23.

None of these interpretations, however, is free from difficulties. If a notice under section 22 (4) may not be issued after a return had been received, what is the object of such restriction? It is for those who import a restriction which the terms of the section do not authorise to show the necessity for importing such a restriction. If, on the other hand, the notice may be issued only after the due date for the return had passed, that is, if the notice can be issued only in those cases in which there is no return, why should section 23 (4) provide for the failure to comply with a notice under section 22 (4), seeing that the failure to submit a return is in itself a ground for summary

assessment? If, as the Lahore High Court have held, the notice may be issued only before the notice under section 23 (2) had been issued, the procedure can only delay assessments since the Income tax Officer would first have to call for accounts and documents and then issue a notice under section 23 (2) if necessary (it will be necessary if a return has been received but not accepted) Moreover, there seems to be no particular reason why a person should be penalised (by way of losing right of appeal) if he will not produce the evidence that he has and that the Income tax Officer requires, if he is asked to produce that evidence at an earlier stage of the proceedings and be let off for the same contumacy at a later stage A more rational explanation of the intention of the Legislature is that severer penalties should be visited for not producing evidence which is in the assessee's possession and which he will not produce, than for not producing other evidence which he may not be so easily able to produce That is why there is no loss of right of appeal for non-compliance with evidence called for under section 23 (3) read with section 37, while there is a penalty and a loss of right of appeal for not producing accounts and documents called for under section 22 (4) and loss of right of appeal for not producing the evidence on which the assessee relies [section 23 (2)] [8]

The interpretation which is most natural and least open to objection is that placed by the majority of the High Courts, *viz*, that the notice under section 22 (4) may be issued at any stage before assessment As the sub section stands it contemplates three separate defaults (*a*) failure to make a return (*b*) failure to comply with a notice under section 22 (4), (*c*) failure to comply with a notice under section 23 (2), and the terms of the section do not make (*b*) in any way dependent on (*a*) Nor do the terms of section 22 (4) make a notice under that sub section hinge on the receipt of the return The words "having made a return" are either surplusage—in which case they merely suggest that "even though a return may have been submitted, etc "—or merely state the obvious fact that a default under section 23 (2) can arise only when a return has been submitted The fact that a notice under section 23 (2) has been complied with will therefore not save the assessee from the consequences of not producing accounts or documents called for under section 22 (4)

In any view there is one anomaly which cannot be got over Let us suppose that an assessee files a return Let us

(8) *R M S R M Ramaswami Chettyar v Commissioner of Income tax, Madras*, 3 I T C 290

also assume that then he is called on to produce accounts under section 22 (4), which he does not comply with Under section 23 (4) the Income tax Officer has no option except to assess him under that sub section, but at the same time, under section 23 (2) he has no option except to serve a notice on the assessee and ask him to produce evidence in support of his return The object of giving such an assessee a notice under section 23 (2) is not clear, and the section evidently does not bring out the exact intention of the framers

Failure to submit return—What is—

It is possible to draw, at least in theory, a line of difference between (1) an incomplete but valid return, *i e*, a return which, on the face of it, fulfils or purports to fulfil the requirements of the law, but owing to some mistake or inadvertence fails to comply with a particular provision or provisions, *e g*, a return complete in all respects but omitting, say, a source of income, and (2) a totally invalid return, *i e*, a return which fails substantially to give the information required by the statutory form of return Thus, a form filled up otherwise than in accordance with the instructions given in the return, or a form not signed or verified or seriously incomplete in respect of the details necessary would appear to be an invalid return A return showing under heading 5—Business, Trade, etc, "Profits or income in money lending business about Rs 5,000" without any details as required by Note 5 of the Instructions in the Return was held to be no return at all [9] The mere signing of the prescribed form of return without filling in any of the columns in it and, with the word 'Blank' written against the item 'total', accompanied by a letter that the person carries on no business in British India, is equivalent to failure to submit a return [10] A return showing 'Nil' everywhere except some items against which 'Loss' was written, no details or figures being shown either in the body of the return or in the form laid down in Note 5 is not a valid return [11] On the other hand a letter with a statement of income and a blank return form might amount to the making of a return [11a] See also the remarks of Lord Stormonth Darling in *Lord Advocate v Sawers*[12] cited under section 51

(9) *Commissioner of Income tax v A R A N Chettiyar and V D M R M Chettiyar* 6 Rang 21

(10) *Pittanchand Dunchand v Commissioner of Income tax* 3 I T C 69

(11) *Jamkissandas Bagri v Commissioner of Income tax Bengal* 2 I T C 3.. see also *Ramchandra Kashinath v Commissioner of Income tax Bihar and Orissa*, set out under section 34 and *Nawalkishore Kharaitilal v Commissioner of Income tax, Delhi* A I R 1930 Lah 1014

(11a) *Gangasagar v Commissioner of Income tax* 4 I T C 9"

(12) 3 Tax Cases 617

Combined notices under different sections—

There is nothing in the law to prevent the issue of a single notice under different sections of the Act, and in particular under sections 22 (4) and 23 (2) together [13] It is unnecessary for a notice to say under what section it is issued All that it need say is what it requires the recipient of the notice to do, and where and when [14]

Failure to submit accounts or evidence—

As regards failure to comply with a notice under section 22 (4) or 23 (2), the failure must be in respect of one of three things (1) producing evidence itself, (2) producing it at a certain time, and (3) producing it at a certain place, and if the person fails in any one of these things it is open to the Income tax Officer to assess him under section 23 (4)

The mere fact that the Income tax Officer does not accept the evidence tendered under section 23 (2) will not bring a case under the provisions of section 23 (4), such non acceptance of evidence cannot constitute non compliance, on the part of the person being assessed, with the terms of the notice under section 23 (2) [15] Whether there has been a compliance with the terms of a notice under section 22 (4) or section 23 (2) is a question of fact [16] but whether on the facts section 23 (4) was rightly applied may be a question of law [17]

Whether books are available or not is a question of fact In a case, therefore, in which the assessee said that certain accounts had been lost or destroyed and the Income tax Officer did not believe the statement, the High Court declined to interfere with the finding of the Income tax Officer [17a] Similarly, if the existence of accounts is denied by the assessee, it would be open to the Income tax Officer to hold on evidence that they existed and were being deliberately withheld [17b]

In a case in which the assessee was asked to produce evidence under section 23 (2) and accounts under section 22 (4),

(13) *Chanda Sen Jain v Commissioner of Income tax, United Provinces* 3 I T C 17 *Harmukhrai Dulichand v Commissioner of Income-tax Bengal*, 7 I T C 198 *Commissioner of Income tax Burma v R M P Chettyar Firm* 3 I T C 335 *R M P L S Sivaswami Chettiar v Commissioner of Income tax Madras* 4 I T C 207

(14) *Ram Khelawan Ugamlal v Commissioner of Income tax Bihar and Orissa* 3 I T C 225

(15) *Raghunath Mahadev v Commissioner of Income tax* 2 I T C 94

(16) *Muzaffar Ali Khan v Commissioner of Income tax Oudh*, 4 I T C 4

(17) *A R A V Chettyar Firm v Commissioner of Income tax, Burma* 2 I T C 477

(17a) *Sankaralinga Nadar v Commissioner of Income tax, Madras*, 4 I T C 226

(17b) *Lachman Das Baburam v Commissioner of Income tax*, 4 I T C 61

but merely turned round and said in effect "We have no evidence to produce and you may decide on the materials before you," without filing any affidavit or making any effort to convince the Income tax Officer of the absence of any evidence in their possession, the Patna High Court held that there was non-compliance with section 22 (4) and section 23 (2), and that an assessment under section 23 (4) was legal [17c]

It is not open to an assessee to refuse to comply with notices issued under section 22 (4) or section 23 (2) on the ground that the question of the Income tax Officer's jurisdiction is under discussion with reference to section 64 [18] On the other hand, having waived the demand for the production of branch accounts and agreed to accept the report of the Income tax Officer having jurisdiction over the branch, the Income tax Officer of the principal place of business cannot declare the assessee to be in default in not producing the branch accounts unless the Income tax Officer issues a fresh notice under section 22 (4) asking for the branch accounts and this notice is not complied with [19]

Whether returns or accounts or documents were in fact produced or not or the terms of notices under sections 22 (2), 22 (4) and 23 (2) complied with or not is always a question of fact [20]

Assessments under wrong sub sections—

It is not open to an Income tax Officer to assess a case under section 23 (4) when it really falls under section 23 (3) or *vice versa*, and the right of appeal to the Assistant Commissioner under section 30 would depend not on the form but on the substance of the assessment order It is an accepted rule that it is the duty as well as the right of an appellate court to determine whether the order is appealable at all, and similarly it would be open to, and it is the duty of, the Assistant Commissioner to determine whether really an order has been passed under the sub section under which it purports to have been passed [1] Thus, there could be no failure within the meaning of sections 22 (4) and 23 (4) on the part of an assessee who does not keep accounts if he does not produce accounts, and such failure cannot be used as a reason for an order under section 23 (4) as below "assessed under section 23 (4) as assessee has no account" (About this, however, *see* below under the heading

(17c) *Mohanlal Hardeo Das v Commissioner of Income tax* 4 I T C 90

(18) *Lachman Das Baburam v Commissioner of Income tax United Provinces* 2 I T C 35

(19) *Lachman Das Baburam v Commissioner of Income tax* 4 I T C 61

(20) *See Tolaram Uttamchand v Crown (Lah)* 2 I T C 301

(21) *Kidlakishan and Sons v Commissioner of Income tax Punjab* 2 I T C 345

"Accounts not kept") If such an assessee had filed a return and was prepared to give evidence under section 23 (2), it is the duty of the Income tax Officer to assess him under section 23 (3) Nor can an Income tax Officer compel the assessee to produce a particular kind of evidence which he is unable to produce, and penalise him on the ground that he did not comply with the notice under section 23 (2). At the same time, an Income tax Officer cannot condone failure and assess a person under section 23 (3) when he ought to assess under section 23 (4) In other words, a mistake on the part of an Income tax Officer can no more give a right of appeal to an assessee in cases in which no such right exists than deprive an assessee of a right of appeal which he has under the law A right of appeal is a matter of substance and not a matter of procedure[21a]

In a case in which an order has been, *on the face of it*, passed wrongly under section 23 (4) instead of under section 23 (3), the assessee need not invoke section 27 but can appeal against the assessment on its merits to the Assistant Commissioner In such cases, it is *obviously not for* the appellate authority to consider whether section 23 (4) was rightly applied or not It is only because the sub section was *obviously* wrongly applied—that is, the Income tax Officer did not apply his mind to the matter,—that the Assistant Commissioner can admit the appeal, and his duty is to consider the appeal on merits as an order under section 23 (3) If there is the slightest doubt as to whether section 23 (4) should have been applied or not, the Assistant Commissioner would refuse to admit the appeal In view, however, of the fact that section 23 (4) leaves no discretion to the Income tax Officer who has no option except to assess under it when certain antecedent circumstances, *viz*, particular defaults, exist, it should be comparatively easy to say whether an order under section 23 (4) is really an order under that section or an order wrongly passed under it The only possible doubtful cases are those in which accounts are not produced and the Income tax Officer does not clearly say in his order that the assessee has accounts and withholds them Once the Income tax Officer has applied his mind to the subject the question whether section 23 (4) was rightly applied or not can only arise in appeal in respect of orders under section 27 refusing to re open an assessment against which an assessee appeals This question is quite different from the question whether the Income tax Officer has applied his mind at all to the subject, it is only in the

(21a) *Colonial Sugar Refining Co v Irving*, (1905) A C 369

latter event that the appellate officer can consider on merits orders passed under the wrong sub section

If an assessment purports to be made under section 23 (4) and it is not apparent that it has been wrongly passed, the normal course would be for the assessee to make an application under section 27 for the re opening of the assessment In the course of the proceedings under section 27 the assessee is sure to discover why the order was passed under section 23 (4) If it is found that the order should really have been passed under section 23 (3), the assessee cannot it is considered, be deprived of the right of appeal under section 30 on the ground that the time for appeal has expired The Assistant Commissioner therefore would be justified in relaxing the time limit which he is empowered to do under section 30

If on the other hand an order has been passed under section 23 (3) when on the face of it, it ought to have been passed under section 23 (4) that is, it is clear from the order that the Income tax Officer had not applied his mind to the questions concerned the appellate officer should reject *in limine* the appeal against the assessment as the assessment is really one under section 23 (4) But this should not operate to deprive the assessee of his right under section 27, if the time has expired and in such cases the Commissioner would probably be prepared to use his powers under section 33 and order an assessment *de novo* if he is satisfied that the circumstances justify it

The point in such cases broadly speaking, is that a mistake on the part of an Income tax Officer should not deprive the right of appeal etc due to the assessee, and that the powers possessed by the Commissioner under section 33 are intended to rectify such mistakes

Cases in which the existence of accounts is believed by the Income tax Officer but denied by the assessee stand on a special footing In such a case, the assessee should move the Income tax Officer under section 27 and appeal to the Assistant Commissioner against the refusal to re open the assessment the "sufficient cause" alleged being the non existence of accounts "

Penal assessment—

An assessee called upon by notice under section 23 (2) to substantiate his return told the Income tax Officer to assess on the materials at his disposal The Assistant Commissioner, on

( ) *Commissioner of Income tax Burma v M K S Chettyar Firm* (1930) I L R 8 Rang 87

appeal, fined the assessee under section 28 Before the High Court the assessee contended that the assessment should have been made under section 23 (4), that the Assistant Commissioner had no jurisdiction to hear the appeal and none to impose a penalty under section 28 *Held,* that the assessment was rightly made under section 23 (3), since the assessee put in an estimate of his income[23]

Assessment under wrong sub section—

In a case in which the Commissioners simply followed the figures of a previous year in fixing the current assessment without at the same time indicating that the assessment had been made by estimate, Rowlatt, J, ordered as below —

> It must go back in order that the Commissioners may state, and state in terms what is the figure which they arrive at applying their minds and their judgments truly and actually to the figures of the relevant years guessing them if you like if they do not know them and if they cannot be informed of them guessing them, if you like to the best of their ability from the sources of information they have and from the best of their skill and judgment but applying their minds really to that because no decision that will stand can be pronounced by people applying their minds to one thing and saying they are applying it to another They must really apply their minds to the real question and then the court must accept it '[24]

It was held by the Lahore High Court in *Khushiram Karamchand* v *Commissioner of Income tax*[25] that it is a question of law whether in the particular circumstances of any case the Income tax Officer was justified in assessing under section 23 (4) or 23 (3)

Accounts not kept—No default—Question of fact—

If a return is made by a person who keeps no accounts, and is therefore unaccompanied by the details required by Note 5 (*b*) in the Return, the return cannot be regarded as invalid because of the omission to furnish them In the first place, Note 5 (*b*) begins "where you do not keep *your* accounts", not 'where you do not keep accounts" and therefore clearly applies only to people who keep accounts of some sort If, therefore, a person who keeps no accounts does not supply the details referred to, he has not failed to furnish anything that the rule requires him to furnish and thus omission does not invalidate the return In the second place, the law, rules and instructions must all be read subject to the maxim "*Lex non cogit ad impos*

(23) *Pitta Ramaswamiah* v *Commissioner of Income tax* 49 Mad 831 2 I T C 196

(24) *Ogilvie* v *Larron* 11 Tax Cases 503

(25) 100 I C 774

sibilia'—A person cannot be penalized for not doing what he cannot do Whether there are accounts is a question of fact on which the Income tax Officer has to arrive at a finding [26] The Income tax Officer cannot assume that there has been a default unless it is clear from the return or from other evidence that the assessee is intentionally omitting to do what he is in a position to do In doubtful cases, therefore, *i e*, where there is not adequate evidence to enable the Income tax Officer to find that accounts are in fact being kept but withheld, it is only fair that he should not treat the assessee as in default in respect of the notice under section 22 (4) but give him a chance under section 23 (2), as indeed the Income tax Officer must, if a return has been furnished, and if it is subsequently found that the assessee does maintain accounts, the Income tax Officer could then assess the person under section 23 (4)

Assessment by estimate—

It is not necessary that an assessment based on an estimate should be confined to cases falling under section 23 (4) only There is nothing to prevent such an order being passed under section 23 (3) if the Income tax Officer is not satisfied with the evidence produced by the assessee in support of his return The only difference between the two classes of cases is that the one is appealable and the other not

Orders in writing—

There is nothing in the law requiring that an order under section 23 (4) must be in writing but in practice Income tax Officers no doubt give written orders and these are of importance only in so far as they show *why* section 23 (4) was applied, so that if an appeal is claimed on the ground that the order was not really under section 23 (4), it will be possible for the Assistant Commissioner to deal with the appeal

How section 23 (4) should be applied—

Though no appeal or reference lies against an order passed under section 23 (4) in the event of the defaults mentioned therein, yet it is incumbent on the Income tax Officer to make the assessment to the "best of his judgment,' *i e*, according to the rules of reason and justice, and not according to his private opinion, according to law and not humour, and the assessment is to be not arbitrary, vague and fanciful but legal and regular The only remedy provided by the law against assessments under section 23 (4) is by the exercise of the Commissioner s powers of revision under section 33, and to enable the Commissioner to

(26) *Khushiram Karamchand v Commissioner of Income tax* 100 I C —4.

consider the assessment the Income tax Officer should set out in his order the materials on which his judgment is founded[27]

The question whether the High Court has any jurisdiction at all in regard to such cases was raised in the same High Court in a later case (*P K N P R Chettiyar Firm*) and the Court observed that, in the *S P K A A M case*[27], there were really two questions in the case, *viz*, (*a*) whether section 23 (4) ought to have been applied at all, and (*b*) whether in fact the Income tax Officer applied his "best judgment" The second question was in fact referred by the Commissioner of Income tax and the Court therefore answered it though it did not arise out of an appellate order

Judicial spirit—Exercise of—

As already stated, the Income tax Officer is not a party to a suit—he cannot well be both judge and party—and has no *onus* to discharge and cases may, and no doubt in practice do, some times arise in which the Income tax Officer is not in a position to divulge the source of his information which constitutes the basis of his order, though he must give the information to the assessee so as to give the latter a chance of rebutting it In such cases all that the Income tax Officer has to give reasons for is as to why he disbelieves the evidence produced by the assessee, though he need not give the details of the grounds of his disbelief All that is necessary is that he should act reasonably He may not say, for instance "I do not like the assessee's face and his hair is red, therefore I assess him at Rs 10,000", but he may say: "you live in high style and reports reach me to the effect that you are rich I therefore assess you at Rs 40,000 unless you can prove the contrary" The point is *that the assessee* must have a fair opportunity Silence on the part of the assessee in the face of opportunity given is often the most cogent evidence against him, see per Sargant, L J, in *Haythornthwaite and Sons v Kelly*[28]

"The Income tax Officer should be governed in his procedure by judicial considerations He should base assessment on legal and not mere hearsay evidence, which may be the evidence of his officers or of members of the public, but without evidence that items which do not appear in an account should find a place therein, he is not entitled to assume on mere general hearsay that those items should appear in the account Should he however find on good evidence that even one substantial item is missing he would be entitled to treat the whole account as unreliable"[29]

(27) *S P K A A M Chettiyar Firm v Commissioner of Income tax, Burma 4 I T C 182*

(28) 11 Tax Cases 657

(29) *Baijnath v Commissioner of Income tax Punjab*, 2 I T C 176

The burden of proving income clearly lies on the assessee, since he is in the best position to know the facts—*cf section* 106, *Indian Evidence Act* It is absurd for a person deliberately to withhold evidence, *e g*, his accounts and then complain that the Income tax Officer is not acting in a judicial manner[30] The normal presumption, however, is in favour of good faith, and there should be adequate grounds for disbelieving the assessee's statements[31]

Reasonable opportunity to assessee—

In *Guruva Pillai* v *Commissioner of Income tax* in which the Income tax Officer did not believe the return of the assessee or his accounts, and attempted to frame an assessment on materials gathered by the Income tax Officer from other sources, the Commissioner who was asked to state a case by the High Court, agreed to cancel the assessment and give an opportunity to the assessee to rebut the information on which the Income tax Officer relied

In *Commissioner of Income tax* v *Chanlo Chuan and Tong Hock Hin*[31a] the Rangoon High Court held that the Income tax Officer is not bound to inform the assessee of the specific grounds on which he disbelieves the latter's accounts or other evidence produced The Court suggested however that ordinarily as a matter of fairness the Income tax Officer should inform the assessee of such grounds

Where an assessee declined to account for certain interest bearing capital that was in his possession in previous years, and the Income tax Officer, after giving him an opportunity to prove the contrary, estimated his income on the assumption that the missing capital was still earning interest, it was held that there was evidence on which the Income tax Officer could make the assessment[31b]

"They (proceedings before Income tax authorities) are judicial proceedings in the colloquial sense because the Income tax authorities have to make up their minds judicially with fairness to the public and to the assessee between whom they stand after taking all the facts or such facts as they can into account but they are not judicial proceedings in the strictly scientific sense of the term so as to raise questions in appeal to some higher tribunal as to whether the gentleman making the assessment has decided against the weight of evidence or has disregarded evidence which he ought to have taken into account he (the

(30) *Harmukhrai Dulichand* v *Commissioner of Income tax* 3 I T C 198
(31) *Jambu las* v *Commissioner of Income tax* 104 I C 336
(31a) 3 I T C 397
(31b) *Commissioner of Income tax* v *Sankara Aiyar*, 2 I T C 73

Income tax Officer) must use his best judgment first to obtain and secondly to weigh the available evidence It is to some extent a private inquisition it is confidential, it is not supposed to be disclosed to the public and it is certainly not open to review especially because frequently the Income tax Officer is compelled to draw inferences and to consider evidence which might not be justified by the Evidence Act

As was once said in a case by a well known Judge in England, there is no rule of law compelling a Judge to accept evidence, even though it is uncontroverted, which he believes to be a pack of lies "[33]

An Income tax Officer can refuse to allow the production of evidence which is *prima facie* worthless In a case in which the assessee alleged that his important books of account had been lost and the Income tax Officer disbelieved this, the High Court held that the Income tax Officer was justified in refusing to admit evidence offered by the assessee from his other books of account and regarding the profits of other assessees [33]

The Income tax Officer's personal knowledge would be perfectly good evidence (In re *Bhagat Halwai*[32])

Even if the Income tax Officer's inferences are based on the assessee's own admissions, it may sometimes be necessary to give the assessee an opportunity to show that the inferences are wrong [34]

An assessee when given an opportunity under section 23 (2) failed to produce his books which would have thrown light on certain Bad Debts, the deductibility of which was in doubt *Held*, that the Income tax Officer was justified in disallowing the deduction claimed on account of the Bad Debts [35]

In the words of the Privy Council in *Lapointe* v *L'Association etc, Montreal*,[36] a case of a police pension fund—the Income tax Officer though a Revenue Officer, should act like "a judge, not an inquisitor"—though he is not bound by the forms and procedure of law courts

As to the general principles that should be followed by the Income tax authorities in making a fair and equitable assessment attention is invited to the following decisions, some of which, however, do not relate to revenue matters

Per *Lord Loreburn*—"Comparatively recent statutes have extended if they have not originated, the practice of imposing upon

(32) *Bhagat Halwai* v *Commissioner of Income tax*, 3 I T C 48
(33) *Manoharlal Dei Kirandas* v *Commissioner of Income tax, Punjab*, 3 I T C 317
(34) *Palheylal Balmukund* v *Commissioner of Income tax, United Provinces* (Allahabad), 1930 A L J 1548
(35) *Deokinandan and Sons* v *Commissioner of Income tax, Delhi*, 126 I C 780
(36) (1906) A C 535

departments or officers of State the duty of deciding or determining questions of various kinds In the present instance, as in many others what comes for determination is sometimes a matter to be settled by discretion, involving no law It will I suppose usually be of an administrative kind but sometimes it will involve matter of law as well as matter of fact or even depend upon matter of law alone In such cases the Board of Education will have to ascertain the law and also to ascertain the facts I need not add that in doing either they must act in good faith and fairly listen to both sides for that is the duty lying upon every one who decides anything But I do not think they are bound to treat such a question as though it were a trial They have no power to administer an oath and need not examine witnesses They can obtain information in any way they think best always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view [37]

Per *Viscount Haldane L C* — When the duty of deciding an appeal is imposed those whose duty it is to decide it must act judicially They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice But it does not follow that the procedure of every such tribunal must be the same In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform But what the procedure is to be in detail must depend on the nature of the tribunal In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration rather than to exercise of the judicial functions of an ordinary court to authorities whose functions are administrative and not in the ordinary sense judicial Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community Its character is that of an organization with executive functions In this it resembles other great departments of the State When therefore Parliament entrusts it with judicial duties Parliament must be taken in the absence of any declaration to the contrary to have intended it to follow the procedure which is its own and is necessary if it is to be capable of doing its work efficiently [38]

Per *Lord Shaw* —' The words natural justice occur in arguments and sometimes in judicial pronouncements in such cases My Lords when a central administrative Board deals with an appeal from a local authority it must do its best to act justly and to reach just ends by just means If a statute prescribes the means it must employ them If it is left without express guidance it must still act honestly and by honest means In regard to these certain ways and methods of judicial procedure may very likely be imitated and lawyer like methods may find

(37) *Board of Education v Rice* (1911) A C 179
(38) *Local Government Board v Arlidge* (1915) A C 120

especial favour from lawyers But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation And the assumption that the methods of natural justice are *ex necessitate* those of Courts of Justice is wholly unfounded This is expressly applicable to steps of procedure or forms of pleading In so far as the term natural justice means that a result or process should be just it is a harmless though it may be a high sounding expression in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions and in so far as it is resorted to for other purposes it is vacuous *Ibid*

See also the following cases, *Russel* v *Russel*[39] and *Wood* v *Wood*[40]

The Commissioners have a very large liberty as regards the materials on which they may act in coming to a figure They might take the lease with or without considering the premium paid by the original lessee They might take into consideration if they thought it affected the matter the premiums paid by the successive assignees They might act upon evidence as to the *de facto* annual value of the premises They might act upon their own knowledge of what the annual value ought to be I could not quarrel with any decision they might come to not being a decision in point of law on such matters as that The authorities are given wide powers in matters of that kind It is essential in the highest interest of the revenue which interest is that the public should have confidence in the authorities that these powers should be exercised fairly carefully and indeed almost judicially It is disquieting to find that an assessment is put forward which the Inspector on being confronted with on appeal at once says he is willing to reduce practically by half and it is very regrettable that that half—whether it could be justified upon some totally different kind of reasoning I do not propose to inquire—upon the principle which was adopted and which was accepted should be supported by a use of figures which I can only describe as obviously fallacious '—Per *Rowlatt J* in *Davis* v *Abbott*[41]

United Kingdom Law—

The law in England is substantially the same as here though in one or two respects it differs The Commissioners are not bound to accept the return nor are they bound even to look into all the evidence offered by the assessee if they think that the evidence will not help them. See *R* v *Offlow Commissioners*[42] In this respect the law is more unfavourable to the assessee than in India as under section 23 (2) and (3) the Income tax Officer is bound to hear and consider—whether he accepts it or not—

(39) (1880) 14 Ch D 471
(40) (1874) L R 9 Ex 190
(41) 11 Tax Cases 575
(42) (1911) 27 T L R 353

the evidence produced by the assessee If the assessee does not produce accounts, the Commissioners can, as they indeed must, tax according to an estimate[43] In *Grahamston Iron Company v. Crawford*[44] the Commissioners asked the Company, who were members of an association of producers formed to keep up prices and who claimed as a deduction the subscriptions to the association, to produce a copy of the accounts of the association so that the Commissioners could see how the money was actually spent by the association The Company could not produce the accounts and the Commissioners rejected the claim of the Company It was held by the Scottish Court of Session that the Commissioners were entitled to demand production of the accounts in question A similar decision was arrived at in *Adam Steamship Company v Matheson*[45] In a case of succession, the plea that the successor could not produce the books of the predecessor in order to rebut the estimates made by the assessing authority was not accepted[46] The successor must take the consequences if he fails to take over the predecessor's books or to arrange access to them The point of these decisions is that the onus of proving that an item is deductible rests on the assessee—cf *Nopechand Maganiram v Secretary of State* cited under section 10 (2)

In *Tudor and Onions v Ducker*[47] the accounts of the assessees were prepared by an Accountant who had afterwards been prosecuted by the Board of Inland Revenue for perjury and convicted The accounts in question were therefore rejected by the Commissioners The books of the assessee had been destroyed and the assessment was therefore made by estimate The assessees contended that the accounts produced by the convicted Accountant should be accepted but were unable to produce any evidence to support the correctness of those accounts *Held,* that in the absence of evidence the Commissioners were right in computing the assessments by estimate

In *Gundry v Dunham,*[48] the authorities of a Poor Law Union had all the 'on licence' houses revalued by an expert in a year succeeding that in which the quinquennial review of assessments under Schedule A had been made In a case in which the revaluation had resulted in an increase, the Surveyor of Taxes made an additional assessment The question was raised that

(43) See *R v Chew* 3 Tax Cases [illegible]53
(44) (1915) S C 536
(45) 1 A T C 149 12 Tax Cases 399
(46) *Thomson and Balfour v Le Page* 8 Tax Cases 541
(47) 8 Tax Cases 591
(48) 7 Tax Cases 1[illegible]

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the assessment should not have been based on the Poor Law valuation but on an independent investigation It was *held* by Rowlatt, J, that

It is a reasonable and proper thing, because the Surveyor has not to act by legal evidence, for the Surveyor to assess on the basis of the Poor law if he sees no reason to the contrary Then when it comes before the Commissioners that assessment is not to be distrusted unless the Appellant shows that it is wrong If the Commissioners had refused to receive evidence to show that the Poor law valuation was not correct then they would have been wrong"

In the Court of Appeal, Lord Justice Swinfen Eady said

'In my opinion the Commissioners were not in fact controlled by the Poor Rate Valuation, they had regard to it as they were entitled to they were not bound They were bound to receive any further evidence duly tendered and they appear to have received all the evidence that was in fact tendered"

The evidence produced by the assessee is not conclusive and it is open to the Commissioners to accept it or not The Commissioners are also entitled to avail themselves of their personal knowledge [49]

It will be seen from the decisions referred to above that the procedure in the United Kingdom roughly corresponds to sub sections (2) and (3) of section 23 here On the other hand, the assessee in the United Kingdom has a right of appeal even in respect of estimated assessments This of course places him in a more favourable position than in India

Mandamus—Non-production of books, etc —

The appellant appealed to the Special Commissioners against an assessment and sent in a schedule of accounts and offered to verify them on his oath, but declined to produce his books and vouchers The Commissioners refused to put him on oath and confirmed the assessment with which they were satisfied *Held* by the Court of Appeal, that no mandamus could be granted because (1) the Commissioners were not bound to accept the schedule of accounts merely because the assessee *offered* to verify them on oath, (2) it was a matter for discretion whether they should be so verified, and therefore it was a decision of the Commissioners on a question of fact and not of law, (3) even if it was a point of law whether the Commissioners were bound to put the appellant on oath and the oath was conclusive, it was not a case in which a *mandamus* should be granted [50]

(49) See *Stocks* v *Sulley*, 4 Tax Cases 98
(50) *R* v *Chew*, 3 Tax Cases 289

Unintelligible accounts—

The Commissioners are not bound to accept the accounts irrespective of their intelligibility In a case in which the accounts were voluminous and kept in shorthand, Rowlatt, J, held that the Commissioners were justified in refusing to look at the accounts until the assessee had them prepared by a professional accountant (*Hunt* v *Jolly*, 14 Tax Cases 165) It was held by the Court of Appeal in *Wall* v *Cooper*, 14 Tax Cases 552, that the Commissioners as the final judges of facts had to decide whether the accounts were intelligible or not and that therefore they could ask an assessee to get his accounts recast and certified by a professional accountant

Estimated assessments—

" who if they do not choose as they have not chosen, to state an account so that the amount of profits may be strictly determined, cannot complain if a random assessment is made upon them by the Crown "[1]

' If the Act of Parliament says the amount of profits is to be ascertained they must be whether that can be done in a satisfactory method or not "[2]

Adequacy of notice under sections 22 (4) and 23 (2)—

See *Lachhmandas Baburam* v *Commissioner of Income tax* set out under section 27 The adequacy of notices will arise only under section 27 in determining whether the assessee was prevented by sufficient cause from complying with the notices

Assessment wrongly made under section 23 (4)—

Where the proper authority, the High Court, the Commissioner of Income tax or the Assistant Commissioner as the case may be has declared that an assessment which has been made under section 23 (4) should have been made under section 23 (3) or 23 (1), the assessment, it is submitted, is not completely set aside, and it is not necessary for the Income tax Officer to start *ab initio* with a notice under section 22 (2) All that is required is to treat the assessment as one made under section 23 (1) or (3) and allow an appeal against the assessment and the further rights, if any, arising out of the appeal

[3]**23-A** (1) Where the Income-tax Officer is satisfied that any firm or other association of individuals carrying on any business, other than a Hindu undivided

Power to assess individual members of certain firms associations and companies

(1) *Per* the Lord President in *Macpherson & Co* v *Moore* 6 Tax Cases 107

(2) *Per* Lord Mackenzie *ibid*

(3) Inserted by the Income tax (Amendment) Act (XXI of 1930)

family or a company, is under the control of one member thereof, and that such firm or association has been formed or is being used for the purpose of evading or reducing the liability to tax of any member thereof, he may, with the previous approval of the Assistant Commissioner pass an order that the sum payable as income-tax by the firm or association shall not be determined, and thereupon the share of each member in the profits and gains of the firm or association shall be included in his total income for the purpose of his assessment thereon

Explanation —A member of a firm or association who owns the whole or the major portion of the capital of the firm or association shall not by reason only of that fact be deemed to control the firm or association

(2) Where the Income-tax Officer is satisfied that a company is under the control of not more than five of its members and that its profits and gains are allowed to accumulate beyond its reasonable needs existing and contingent having regard to the maintenance and development of its business without being distributed to the members or that a reasonable part of its profits and gains having regard to the said needs, has not been distributed to its members in such manner as to render the amount distributed liable to be included in their total income and that such accumulation or failure to distribute is for the purpose of preventing the imposition of tax upon any of the members in respect of their shares in the profits and gains so accumulated or not distributed, the Income-tax Officer may, with the previous approval of the Assistant Commissioner, pass an order that the sum payable as income-tax by the company shall not be determined, and thereupon the proportionate share of each member in the profits and gains of the company, whether such profits and gains

have been distributed to the members or not, shall be included in the total income of such member for the purpose of his assessment thereon

Provided that this sub-section shall not apply to any company which is a subsidiary company or in which the public are substantially interested

Explanation —For the purpose of this sub-section,—

(*a*) a company shall be deemed to be a subsidiary company if, by reason of the beneficial ownership of shares therein, the control of the company is in the hands of a company not being a company to which the provisions of this sub-section apply or of two or more companies none of which is a company to which those provisions apply ,

(*b*) a company shall be deemed to be a company in which the public are substantially interested if shares of the company (not being shares entitled to a fixed rate of dividend, whether with or without a further right to participate in profits) carrying not less than twentyfive per cent of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the previous year beneficially held by, the public (not including a company to which the provisions of this sub-section apply), and if any such shares have in the course of such previous year been the subject of dealings in any stock exchange in British India or are in fact freely transferable by the holders to other members of the public

(*c*) unless the contrary is proved, a company shall be deemed to be under the control of any persons where the majority of the voting power or shares is in the hands of those persons or of relatives or nominees of those persons ,

(*d*) "nominee means a person who may be required to exercise his voting power on the directions of, or

holds shares directly or indirectly on behalf of, another person

(3) The Assistant Commissioner shall not give his approval to any order proposed to be passed by the Income-tax Officer under this section until he has given the firm association or company concerned an opportunity of being heard

(4) (*i*) Where any member of a firm or association of individuals makes default in the payment of tax on his share of profits and gains which has been included in his total income under the provisions of sub-section (1), such tax may be recovered from the firm or association, as the case may be.

(*ii*) Where the proportionate share of any member of a company in the undistributed profits and gains of the company has been included in his total income under the provisions of sub-section (2), the tax payable in respect thereof shall be recoverable from the company and may be recovered from such member, if there are not sufficient funds in the hands of the company to pay the tax, or if the winding up of the company has commenced

(*iii*) Where tax is recoverable from a company, firm or other association under this sub-section, a notice of demand shall be served upon it in the prescribed form showing the sum so payable, and such company, firm or association shall be deemed to be the assessee in respect of such sum for the purposes of Chapter VI

(5) Where tax has been paid in respect of any undistributed profits and gains of a company under this section and such profits and gains are subsequently distributed in any year, the proportionate share therein of any member of the company shall be excluded in computing his total income of that year.

History—

This section was inserted by Act XXI of 1930 The amending Bill was circulated twice and referred to Select Committee twice The final form of the section is totally different from that in the Bill as introduced in 1927

General scope of the section—

The object of this section is not, as has been often misunderstood, to declare firms and companies to be bogus Quite apart from this section it is open to the Income tax authorities, who are the sole judges of questions of fact, to examine not only the form but the substance of the transactions of assessees and to assess on the basis of the true facts as thus ascertained, ignoring the form, if that is a *simulacrum* *See* decision in In re *Petit*, 2 I T C 255 and connected cases set out under section 3 The object of this section, on the other hand, is to enable the Income tax Officer in certain circumstances in which tax is being deliberately evaded to ignore the firm or company, however genuinely the firm or company might be constituted and tax the partners or members directly on the profits, without any obligation on his part to find that the firm or company is a sham The section applies to all associations other than Hindu Undivided Families

Firms and associations other than companies—

Before a firm or association can come within the scope of this section, the Income tax Officer should be satisfied that it (i) is under the control of one member thereof, and (ii) has been formed or is being utilised for the purpose of evading or reducing the liability to tax of any member thereof Both the conditions should be fulfilled Further, a member of a firm or association who owns the whole or the major portion of the capital of the firm or association shall not by reason only of that fact be deemed to control the firm or association This explanation was added by the First Select Committee to protect genuine firms which are common in India in which one man puts up the whole or the major portion of the capital and is the principal partner in possibly a dozen or more firms with working partners associated with him, and which are in fact not formed or used for the purpose of evading tax

The Income tax Officer should, it seems, record a definite finding on the facts that the conditions prescribed in this sub-section have been fulfilled before he applies the sub section against a firm or association

Evasion by firms—

The scope for evasion arises mainly because of the option given to firms to register or not as they desire The option has been given in order to avoid the inconvenience that might otherwise arise in regard to refunds if every firm were treated as registered and taxed at the maximum rate in the first instance—*see* the report of the Joint Select Committee of 1922 The existence of this option is utilised by persons to evade tax by sub dividing their business between a number of unregistered firms each of which is taxed at a comparatively low rate while if the firms were all registered the dominant partners would have to pay higher rates of tax Similarly a group of firms under the same person's control may register themselves only in some years but not in others according as which course reduces the burden of taxation on the controlling partner

Companies—

Before a company can be brought under this section, the Income tax Officer should be satisfied that—

(1) It is under the control of not more than five of its members and

(2) Its profits and gains are allowed to accumulate beyond its reasonable needs, existing and contingent, having regard to the maintenance and development of its business, without being distributed to the members or

a reasonable part of its profits and gains has not been distributed to its members in such manner as to render the amount distributed liable to be included in their total income, and

(3) The accumulation or failure to distribute is for the purpose of preventing the imposition of tax upon any of the members in respect of their shares in the profits and gains accumulated or not distributed, and

(4) It is not a subsidiary company or one in which the public are substantially interested

All these conditions are cumulative except those in (2) which are alternative

Evidently, the Income-tax Officer must record a definite finding on every one of these points before he applies this section against a company

Subsidiary company—What is a—

By explanation (*a*) of sub section (2), a company should be deemed to be a subsidiary company if, by reason of the beneficial ownership of shares therein, the control of the company is

in the hands of a company not being a company to which the provisions of the sub section apply or of two or more companies none of which is a company to which these provisions apply The protection given by this sub section will not therefore cover companies held by companies caught by this sub section

Companies in which the public are substantially interested—

By explanation (*b*), sub section (2) a company shall be deemed to be a company in which the public are substantially interested (1) if shares of the company (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) carrying not less than 25 per cent of voting power have been allotted unconditionally to or acquired unconditionally by and are at the end of the previous year beneficially held by, the public (not including a company to which the provisions of this sub section apply) and (2) if any such shares have in the course of the previous year been the subject of dealings in any stock exchange in British India or are in fact freely transferable by the holders to other members of the public Two sets of conditions have to be satisfied while there are alternatives in each set

It will be noted that preference shares are excluded in determining the 25 per cent voting power held by the public *i e* they should have 25 per cent voting power in the shares other than preference shares

The date with reference to which the criteria have to be applied is the last day of the accounting year the profits of which are under assessment

Control—What is—

According to explanations (*c*) and (*d*) *unless the contrary is proved* a company shall be deemed to be under the control of *any persons when the majority of the voting power or shares is* in the hands of these persons or of relatives or nominees of these persons and a nominee means a person who may be required to exercise his voting power on the direction of or holds shares directly or indirectly on behalf of another person The words unless the contrary is proved which are really otiose were inserted by the Second Select Committee in order to make it clear that the company will be entitled if it can do so to rebut the presumption set up by the explanation

The incentive for the evasion of tax through the formation of companies lies in the fact that super tax on individuals is levied at graduated rates while that on companies is at a flat rate which is lower than the lowest rate on individuals The evasion

may take several forms, *e g*, (*a*) Non distribution of profits altogether and utilisation in the business itself for its expansion, (*b*) giving of loans to the members, (*c*) grant of bonus shares, (*d*) purchase of business at an inflated price by the company from a shareholder in return for equated payments of the purchase price to the shareholder, (*e*) periodical liquidation and reconstruction All these cases will be caught by section 23 A, as it stands now

Its reasonable needs, existent and contingent, having regard to the maintenance and development of its business—

The development contemplated is the natural development of the business, not that of embarking totally on new ventures or even of expanding the business on a very large scale so as to make it practically a new business The dividing line between normal development and abnormal expansion is necessarily thin; and what is reasonable in a given case must largely be a matter of opinion Relevant facts would be the past history of the business and its past development, competition with rivals, the need for research and experiment, impending obsolescence of current methods of manufacture, and so forth The final decision on appeal in regard to these questions has accordingly been placed in the hands of Boards of Referees composed partly of businessmen and of a majority of non officials—*see* section 33 A

To quote the Second Select Committee these words were added 'to place beyond doubt that accumulations made by a company as a matter of sound financial practice or in order to make provision for the development of its genuine business shall not come within the scope of this sub section'

The word "genuine" requires to be emphasised

"Has not been distributed in such manner as to render the amount distributed to its members liable to be included in their total income" This is intended to catch not only bonus share distributions but other payments which are formally capital but are really revenue, *e g*, instalments of artificially inflated purchase price so fixed as to swallow up all the profits that the business can be normally expected to yield, payments on winding up and the like *See* the report of the Second Select Committee which, however, refers specifically only to bonus shares

Existing and contingent—

For example, a company which is quite in a strong position financially may be temporarily short of cash the funds being locked up in goods This would be an existing need On the other hand, heavy purchases whether of goods or of machinery,

etc, may be necessary in the near future for various reasons This would be a contingent need The word "needs" will evidently have to be construed in the sense of "necessary or advisable" rather than in the strict sense of "necessity" alone

Reasonable part of profits not distributed—

In considering this point, it is relevant to see whether after providing for reasonable needs, etc, the balance has been distributed in a taxable form The percentage of dividend on the nominal value of the shares is obviously beside the point

Whole profits to be taxed on the members—

If a company is brought under this section the whole of its profits and not merely a reasonable part that should have been distributed is taxable in the hands of its members If, on the other hand, a company does not come under this section, the fact that certain individuals obtain definite advantages in the matter of tax by forming themselves into a company is irrelevant, unless the Income tax Officer can find on the facts that the company is a sham If it is a sham he can simply ignore the form of the company and tax the true owner of the income See In re *Petit*,[4] in that case section 23 A does not come in at all

Previous approval of Assistant Commissioner—

Both in the case of firms and associations and in that of companies, it is necessary for the Income tax Officer to obtain the previous approval of the Assistant Commissioner before taking action under this section Under sub section (3) the Assistant Commissioner should give an opportunity to the firm, association or company of being heard before he gives his approval to the Income tax Officer's proposal In view of this previous approval of the Assistant Commissioner no appeal lies to him from the Income tax Officer's order under section 23 A but to the Commissioner only *See* section 33 A

How assessment made—

In the case of a firm or association, the sum payable as income tax by it shall not be determined and the share of each member in the profits and gains of the firm or association shall be included in his total income for the purpose of his assessment thereon Similarly in the case of a company, the sum payable as income tax by the company shall not be determined, and the proportionate share of each member in the profits and gains of the company, whether such profits and gains have been distributed to the members or not, shall be included in the total income of such member for the purpose of his assessment thereon In

(4) 2 L T C 255

either case what happens is that the association is ignored and the individual taxed directly The slight difference between the wording in the two cases is due to the fact that in the case of a company there are two possible methods of evasion, *viz*, non distribution and distribution in a non taxable form, *e g*, bonus shares That is why the words "whether such profits and gains have been distributed to the members or not" have been added in the case of companies

Recovery of tax—From whom—

In the case of a firm or association, tax is recoverable from the member, and if he does not pay, the tax may be recovered from the firm or association In the case of a company, on the other hand, the tax payable by the member—though assessed on him—is recoverable from the company and may be recovered from the member only if there are not sufficient funds in the hands of the company to pay the tax or if the winding up of the company has commenced

Enforcement of demand—

Clause (*iii*) of sub section (4) extends the machinery of Chapter VI to the assessments made under this section

Relief from taxation twice—

Sub section (5) provides that if undistributed profits an gains have been once taxed under this section, they shall b ignored when they are actually distributed subsequently

United Kingdom law—

Extracts from the corresponding provisions in the United Kingdo law are set out below—

Extracts from section 21 of the Finance Act, 1922 and First Schedule —as amended by the Finance Act of 1927 and 1928

Section 21 —With a view to preventing the avoidance of the payment of super tax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows —

(1) Where it appears to the Special Commissioners that an company to which this section applies has not, within a reasonable time after the end of any year or other period ending on any date subsequent to the fifth day of April nineteen hundred and twenty two for which accounts have been made up distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super tax a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may by notice in writing to the company, direct that for purposes of assessment to super tax, the said income of the company shall, for the year

or other period specified in the notice be deemed to be the income of the members and the amount thereof shall be apportioned among the members and super tax shall be assessed and charged under the provisions of this section in respect of the sum so apportioned after deducting in the case of each member any amount which has been distributed to him by the company in respect of the said year or period in such manner that the amount distributed falls to be included in the statement of total income to be made by that member for the purposes of super tax

Provided that in determining whether any company has or has not distributed a reasonable part of its income as aforesaid the Commissioners shall have regard not only to the current requirements of the company s business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business

For the purpose of this sub section any such sum as is hereinafter described shall be regarded as income available for distribution among the members of the company and not as having been applied or being applicable to the current requirements of the company s business or to such other requirements as may be necessary or advisable for the maintenance and development of that business that is to say —

(a) Any sum expended or applied or intended to be expended or applied out of the income of the company otherwise than in pursuance of an obligation entered into by the company before the fourth day of August nineteen hundred and fourteen—

(i) in or towards payment for he business undertaking or property which the company was formed to acquire or which was the first business undertaking or property of a substantial character in fact acquired by the company or

(ii) in redemption or repayment of any share or loan capital or debt (including any premium on such share or loan capital or debt) issued or incurred in or towards payment for any such business undertaking or property or issued or incurred for the purpose of raising money applied or to be applied in or towards payment therefor or

(iii) in meeting any obligations of the company in respect of the acquisition of any such business undertaking or property

(b) Any sum expended or applied or intended to be expended or applied in pursuance or in consequence of any fictitious or artificial transaction

(2) Any super tax chargeable under this section in respect of the amount of the income of the company apportioned to any member of the company shall be assessed upon that member in the name of the company and subject as hereinafter provided shall be payable by the company and all the provisions of the Income tax Acts and any regulations made thereunder relating to super tax assessments and the collection and recovery of super tax shall with any necessary modification apply to super tax assessments and to the collection and recovery of super tax charged under this section

(3) A notice of charge to super tax under this section shall in the first instance be served on the member of the company on whom

the tax is assessed and if that member does not within twenty eight days from the date of the notice elect to pay the tax a notice of charge shall be served on the company and the tax shall thereupon become payable by the company

Provided that nothing in this sub section shall prejudice the right to recover from the company the super tax charged in respect of any member who has elected as aforesaid but who fails to pay the tax by the first day of January in the year of assessment or within twenty eight days of the date on which he so elected whichever is later

(4) Any undistributed income which has been assessed and charged to super tax under this section shall when subsequently distributed, be deemed not to form part of the total income from all sources for the purposes of super tax of any individual entitled thereto

Where a member of a company has been assessed to and has paid super tax otherwise than under this section in respect of any income which has also been assessed and upon which super tax has been paid under this section he shall on proof to the satisfaction of the Special Commissioners of the double assessment be entitled to repayment of so much of the super tax so paid by him as was attributable to the inclusion in his total income from all sources of the first mentioned income

This section shall apply to any company which is under the control of not more than five persons and which is not a subsidiary company or a company in which the public are substantially interested.

For the purpose of this sub section—

A company shall be deemed to be a subsidiary company if by reason of the beneficial ownership of shares therein, the control of the company is in the hands of a company not being a company to which the provisions of this section apply or of two or more companies none of which is a company to which those provisions apply,

A company shall be deemed to be a company in which the public are substantially interested if shares of the company (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) carrying not less than twenty five per cent of the voting power have been allotted unconditionally to or acquired unconditionally by and are at the end of the year or other period for which the accounts of the company have been made up as aforesaid beneficially held by the public (not including a company to which the provisions of this section apply) and any such shares have in the course of such year or other period been the subject of dealings on a stock exchange in the United Kingdom and the shares have been quoted in the official list of such a stock exchange

The expression company' means a company within the meaning of the Companies (Consolidation) Act, 1908

A company shall be deemed to be under the control of any persons where the majority of the voting power or shares is in the hands of those persons or relatives or nominees of those persons or where the control is by any other means whatever in the hands of those persons,

The expression "relative" means a husband or wife, ancestor or lineal descendant brother, or sister,

The expression "nominee" means a person who may be required to exercise his voting power on the directions of or holds shares directly or indirectly on behalf of another person

Persons in partnership and persons interested in the estate of a deceased person or in property held on a trust shall respectively be deemed to be a single person

In this section the expression member' shall include any person having a share or interest in the capital or profits or income of a company

First schedule—

7 If any company fails or refuses on being so required in accordance with the provisions of this schedule to furnish a statement of actual income from all sources or renders a statement with which the Special Commissioners are not satisfied the Commissioners may make an estimate of that income to the best of their judgment

8 The apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members and the income as apportioned to each member (so far as assessable and chargeable to super tax under section twenty one of this Act) shall for the purposes of super tax be deemed to represent his income from his interest in the company for the year or other period and shall be included in the statement of his total income or in an amended statement of total income which the Special Commissioners are hereby authorised to require and shall be deemed to be the highest part of that income

9 The income apportioned to a member of a company so far as assessable and chargeable to super tax under section twenty one of this Act shall for the purposes of that tax be deemed to have been received by him on the date to which the accounts of the company for the year or period were made up or if an application in that behalf is made by the company to the Special Commissioners at any time within the period limited by this Schedule for giving notice of appeal against the direction to the Special Commissioners on such date as those Commissioners determine to be just having regard to the dates on which distributions of income have been made by the company and so as to avoid as far as possible the inclusion for the purposes of super tax for any year of income referable to more than one year

10 Notice of any apportionment made by the Special Commissioners shall be given by serving on the company a statement showing the amount of the actual income from all sources adopted by them for the purposes of section twenty one of this Act and either the amount apportioned to each member or the amount apportioned to each class of shares as they think fit

A company which is aggrieved by any notice of apportionment shall be entitled to appeal to the Special Commissioners on giving notice

to their clerk within twenty one days after the date of the notice, and those Commissioners shall hear and determine the appeal and all the provisions of the Income tax Acts and any regulations made thereunder relating to appeals against assessments and to cases to be stated for the opinion of the High Court shall with any necessary modification, apply for the purposes of any such appeal

11 Any person in whose name any shares of a company are registered shall if required by notice in writing by the Special Commissioners state whether or not he is the beneficial owner of those shares and if not the beneficial owner of those shares or any of them shall furnish the name and address of the person or persons on whose behalf the shares are registered in his name

If any person on being so required neglects or fails to comply with the notice within the time limited by the notice he shall be liable to a penalty of twice the amount of super tax that would be chargeable at the highest rate in respect of the amount of the income apportioned to such shares

The absence of any provisions in regard to firms is due to the fact that in the United Kingdom all firms are dealt with very much like registered firms in this country The provisions relating to companies in the Indian law have been closely modelled on the United Kingdom law many of the provisions having been almost copied out

The more important points of difference are the following —(a) The United Kingdom law merely says that 'with a view to preventing the avoidance of the payment of super tax etc it is hereby enacted In this country on the other hand one of the conditions precedent to the application of section 23 A to a given firm or company is that 'the firm or association has been formed or is being used for the purpose of evading or reducing the liability to tax of any member thereof' or that 'such accumulation or failure to distribute (profits of the company) is for the purpose of preventing the imposition of tax upon any of the members in respect of their shares in the profits and gains so accumulated or not distributed In other words it is necessary for the income tax authorities in this country to find definitely that there is *deliberate* avoidance whereas in the United Kingdom it is not Though the Select Committee said that they were merely following the United Kingdom law they have in fact placed a somewhat heavier burden on the income tax authorities in this country than in the United Kingdom (*b*) In the United Kingdom tax is recoverable from the shareholder in the first instance and failing him from the company Here on the other hand the tax is recoverable from the company in the first instance and failing it from the shareholder (*c*) In the United Kingdom (*see* section 18 of the Finance Act of 1928) a company may of its own accord send its accounts etc to the Commissioners and unless they take action against the company within a limited time no action can be taken against the company at all This provision is intended to help companies in deciding on their future policy in regard to development

The following are minor differences in the provisions in the two countries —(1) In the United Kingdom the distribution of profits should

be made within a reasonable time after the period to which the profits relate There is no such provision in this country but it makes little difference because the Income tax Officer cannot hold that there has been an accumulation until after waiting a reasonable time (2) The words in the United Kingdom law corresponding to the words, 'its reasonable needs, existing and contingent, having regard to the maintenance and development of its business' in the Indian law are 'have regard not only to the current requirements of the company's business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business' The words 'existing and contingent' give slightly more elasticity in the Indian law, while the words 'necessary or advisable', as against the word 'needs' in the Indian law give more elasticity to the United Kingdom law (3) The word relative' has been defined in the United Kingdom and confined to certain stated degrees of relationship but in this country because of its social conditions the word has been left undefined

There are various peculiar provisions in the United Kingdom because the companies aimed at are those either formed after August 1914 or use for the purpose of avoidance after that date The procedure and machinery also differ in that country from those here *See* notes under section 33 A

Rulings in the United Kingdom—

A husband and wife owned 9,995 out of 10,000 shares in a private company The company, though not formed as an insurance company, did nothing but issue what were called endowment policies to the husband and wife in return for lump sum premia in National War Bonds equal in face value to the amounts assured under the policies There was no provision either in the policies or in the company's articles giving a claim to the policy holders to a share in the profits of the company, though the policies stated that the company would pay the amounts assured *plus* "any bonus which at the time of payment will be attached to the policy" The directors periodically appropriated to the credit of each policy an amount roughly equal to the interest on the bonds delivered as premium, and the amounts so appropriated was reinvested in War Bonds No notice of appropriation was communicated to the policy holders

It was contended by the company that the appropriations were binding on it and that the sums so appropriated were not available for the payment of dividends

Held, that the sums were available for distribution as dividends for the purpose of section 21 of the Finance Act of 1922[5]

(5) *Endowment Company Ltd v Commissioners of Inland Revenue* 14 Tax Cas 303

Whether object of evasion of tax to be proved—

it is true that the mischief for which the section provides a remedy is the avoidance of a liability to super tax by the accumulation of the profits in the hands of the companies But the application of the remedy does not I think depend on the proof of motive on the part either of the company or its shareholders unless indeed in this sense the object to avoid payment of super tax is an inferential presumption from the fact that the restriction of dividend cannot be accounted for either by the current or prospective requirements of the company or by the maintenance or development of its business That fact must be proved to the satisfaction of the Commissioners but if it is established they have neither right nor duty to carry their investigations into matters of intentions or motive any further "—Per L P Clyde

the direction is plain and is not subject to the qualification that the Commissioner must be satisfied that the motive was the avoidance of super tax Human motives are obscure and difficult of ascertainment sometimes conjectural and their ascertainment cannot appropriately be allowed to enter into the matter of collection of public revenue It is quite open to the shareholders to satisfy the Special Commissioners that they have a reasonable cause for withholding from distribution a considerable part of the profits If they fail to do so then in view of the Legislature there is a presumption of law that avoidance of super tax is the object of the retention of undistributed profits and it is unnecessary in a particular case that the Commissioners should so find"—Per Lord Sands

If the language of the enacting part of section 21 is clear as I think it is there is the absence of any ambiguity in the enacting words it follows that the preamble of section 21 cannot either restrict or extend the enacting provisions in the section "—Per Lord Ashburn[6]

Income available for distribution"—

In determining what is a reasonable part, attention is not to be directed to a merely arithmetical question of proportion A "reasonable part is a reasonable part *for distribution*, and therefore one has to look at whether the act of refraining from distribution is reasonable It cannot be argued that the distribution is not to be governed by reason but that the part thereof has to be dissected as a matter of figures upon the principles of reason It is quite true that for the purposes of super tax a person cannot denude himself of income by merely putting it under the control of a mortgagee who uses it to pay the mortgagor's own debt But the point here is whether the borrower has distributed a reasonable part of the income, and the question is whether it is reasonable to distribute it when it is not available you cannot therefore distribute it

(6) *David Carlow and Sons Ltd v Commissioners of Inland Revenue* 11 Tax Cases 36

Two persons who between them owned all the shares of a company formed a new company to hold the shares of the old company Money for the purchase of the shares was advanced by a bank to whom the shares of the old company which were to be acquired by the new company were mortgaged The bank received the dividends declared so as to keep down the interest and in fact to wipe out the capital *Held*, that the income of the company in so far as it was already mortgaged to the bank was not available for distribution, and that it was available for distribution in so far as it was laid out on new ventures [6a]

In a case in which there was no contract that the profits of the company should be paid in liquidating the principal of the mortgages but there was an article of the company that except under special resolution to the contrary the net profits shall be applied in the discharge of the mortgages, it was held that the profits of the company were available for distribution The question to consider in such cases is whether the company looking at it as a whole has distributed a reasonable part of its income and in doing so one has to examine the reasons for not distributing In the *Glazed Kid case* there was a contract with an outsider under which the company was bound to pay all the profits to an outsider and if the company did not, it would have been restrained by injunction at once In this case on the other hand the shareholders merely did not want the profits to be distributed and gave effect to this intention through the articles

The scheme of the law is that companies are divided into two classes those who distribute reasonably and those who do not If they do not then the company falls to be dealt with much as if it were a partnership Otherwise it goes on as a company.[6b]

Set off of loss in computing aggregate income

24 (1) Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 6, he shall be entitled to have the amount of loss set off against his income, profits or gains under any other head in that year.

(2) Where the assessee is a registered firm, and the loss sustained cannot wholly be set off under sub-section (1), any member of such firm shall be entitled to have set off against any income, profits or gains of the year in which the loss was sustained in respect of which the tax is payable by him such amount of the loss not already set off as is proportionate to his share in the firm.

(6a) *Glazed Kid, Ltd* v. *Inland Revenue*, 9 A T C 207.

(6b) *Colville Estates, Ltd.* v. *Inland Revenue*, 9 A. T. C. 233.

History—

Under the Act of 1918 it was the aggregate amount chargeable under each of the separate heads mentioned in sections 7 to 12 of the Act that determined the total and taxable income of an assessee, so that when a person carried on a trade or profession and also had income from house property, if he had actually incurred a loss from the trade or profession the figure adopted under that head in arriving at the aggregate amount of the income chargeable to tax was *nil* and not a *minus* sum Under the provisions of section 24 of the Act a loss under one head of income may now be charged against profits under another in the same year

Instructions of the Central Board of Revenue—

Sub section (2) of section 24 only applies specifically to the case of a registered firm but the Madras High Court has held[7] that under the provisions of section 24 (1) a partner in an unregistered firm is entitled to set off his share of the net loss incurred by the firm in the same circumstances and to exactly the same extent as a partner in a registered firm It has been decided to accept that decision The result is as follows A firm owning property or having income from a business and being in receipt of interest on securities would under the provisions of sub section (1) be entitled to set off a loss from the business against its income chargeable in respect of interest on securities under section 8 or property under section 9 But it might happen that a firm might incur a net loss in which case it would not be liable to tax Sub section (2) specifically provides for such a case

Illustration—

A firm has property the annual value of which is Rs 2 000 income from interest on securities amounting to Rs 1 000 and carries on a business from which it incurs in one year a loss of Rs 10 000 The firm is entitled under the provisions of sub section (1) of section 24 to set off the loss from business against the annual value of the property and the interest on securities and its total income would be *minus* Rs 7 000 A who is a partner in the firm having a share of one half in the profits thereof has other personal income of Rs 6 000 from interest on securities He is entitled under the provisions of sub section (2) to set off his share of the net loss from the firm (*viz* Rs 3 500) against this personal income and would be assessed on a total income of Rs 2 500

Where an individual is a partner in two separate firms of which one is registered and the other unregistered and has no separate personal income he should be allowed in dealing with any application for refund under section 48 to set off his share of any net loss incurred by the unregistered firm against his share of the profits of the registered firm For example B having a half share in an unregistered firm which incurred a net loss of Rs 2 000 in one year had in the same year no personal income liable to assessment to income tax in his own hands but

( ) See Decisions *infra*

had a similar share in another registered firm which had made a net profit of Rs 10,000 Such cases will be rare and should be dealt with on the basis of real income, i e, in the case above quoted, 'A' should get a refund so adjusted that he shall suffer finally tax of 5 pies in the rupee on his real income of Rs 5 000 *minus* Rs 1 000, i e, Rs 4,000 The same principle would apply if both firms were registered Where the situation is reversed, that is where the registered firm makes a loss and the unregistered firm a profit obviously no relief can be given Nor can an unregistered firm claim to set off losses of the individual partners against the income of the firm But a partner in a registered firm should be allowed to set off loss incurred in his individual capacity against his income as partner in dealing with any application under section 18

Similarly if 'A' has a loss of Rs 1 000 in business an income of Rs 1,000 from interest on securities and an income of Rs 3 000 from dividends, he should be allowed to set off his loss of Rs 1,000 against his income of Rs 4,000 and should be taxed on the balance of Rs 3 000

In the same way, if A borrows money to buy securities or shares and the interest on the loan exceeds the interest or dividend that he receives he is entitled to set off the excess of interest paid over the interest or dividend received against any other taxable income (*See* para 28)

The correct procedure in such cases is to ascertain the total income after allowing the set off calculate the tax on that at the appropriate rate (apply section 17 if the circumstances justify such a course) credit the tax suffered ' on the dividends on the one hand and debit any refunds granted under section 48 on the other and collect or refund the balance as the case may be

From the point of view of equity it is obviously reasonable to allow a set off in these cases from the legal point of view it is incorrect to argue that section 24 (1) is inapplicable to such cases on the ground that income from dividends or income derived from a firm is not (from the point of view of the shareholder or partner) income falling under any of the heads mentioned in section 6—section 24 (1) Obviously such income must fall under one of these heads otherwise, (*a*) *it could not be included in the total income of the shareholder or partner* but it is so *included—section 16, and* (*b*) *the shareholder or partner could in no* circumstances be assessed individually on such income but under section 14 (2) he is assessable on such income if it so happens that the company or firm has not been assessed Consequently such income from dividends or from a firm must fall under one of the heads in section 6 Income from dividends should evidently be regarded in the hands of the share holder is income from Other sources while income from a firm should be regarded in the hands of the partner as income from "Business" On the other hand the partner or shareholder is not an "assessee" in respect of such income unless the firm or company has not been assessed (*Income tax Manual* para 72)

Unregistered firms—Position of Partners—

It is evident that the framers of the Act did not consider sub section (1) to apply to losses sustained by a member of a

registered firm, as otherwise sub section (2) would be superfluous The question next arises why no special provision was made for unregistered firms Two explanations are possible—either such special provision was considered unnecessary on the ground that sub section (1) covered such cases or it was deliberately intended to differentiate between registered and unregistered firms As already explained, the obvious idea of the framers was that if sub section (1) stood alone, a member of a registered firm would not be able to set off any part of its losses against his personal income, profits or gains This must have been on the assumption that the losses of the registered firm are sustained not by the individual partners but by the firm which is a separate entity for this purpose If this is true of a registered firm, it is at least equally—and perhaps with greater force—true of an unregistered firm also That too is a separate entity and the Act not only recognises this fact throughout but makes the profits taxable not in the hands of the individual partners but in those of the firm itself except to the extent that (1) if the firm is not assessed—because its income is below the taxable limit or for any other reason—the partners may be taxed in respect of their shares in the firm's profits, (2) the share from the unregistered firm is taken into account in fixing the 'rate' of the tax payable by the partner, and (3) if the unregistered firm is not assessed to super tax the share of the partners will be assessable to super tax if the partners are individually liable to super tax

It follows, therefore, that if an unregistered firm sustains a loss, that loss falls on the firm as such and cannot be set off by a member of the firm against his income from other sources This position is also reached by the application of the *expressio unis est exclusio alterius* rule to construe the section, sub section (2) of which makes an exception in the case of a registered firm only This line of argument, however, has been rejected by the existing decisions

Decisions—

A firm carrying on business in piece goods was a major partner in two other firms carrying on the same business The other partners in the two other firms had a nominal share in order to encourage them to take an interest in the business *Held*, that the losses in the other two firms could be set off against the profits in the first This decision was given under the 1918 Act which contained no provision corresponding to section 24 of the present Act, and the *ratio decidendi* was as below —

'The determination depends upon whether it is a fact that the business of (the first firm) is being carried on in part by engaging with partners in the other firms When the subsidiary business engaged in is connected with the main business and is a proper employment of the assessee's capital or labour, it is in my judgment for the purpose of assessment to be treated as part of the business of the firm If the firm in one branch makes a loss that loss may be set off against the profits made in its head office or other branches"—Per *Schwabe, C J* 'Here we have a company (firm?) part of whose business is to hold a share in a separate business It takes this share in the course of its own business and it receives whatever profit it receives or loses whatever it loses in the course of its own business —Per *Coutts Trotter, J*[8]

In In re *Arjun Khemji & Co*[9]—also under the 1918 Act—it was held by the Judicial Commissioner of Nagpur that the share of a partner's loss in an unregistered firm can be deducted from his other income The same Court also held in *Seth Bal kishan Nathani v Commissioner of Income tax*[10] that losses suffered by an assessee as a member of a firm are to be taken into account in fixing the amount of his taxable income—under section 12 (1) of the 1918 Act (corresponding to section 14 of the present Act) As already observed there was no section in that Act corresponding to section 24 in the present Act

The question again arose, this time under the present Act, in *Commissioner of Income tax v M Ar Arunachalam Chettiar*[11] The assessee carried on two different businesses, one individually and the other as a partner in an unregistered firm *Held,* that the loss in the partnership could be set off against the profit in the individual business

' Assessee is defined in section 2 as a person by whom income-tax is payable' No mention is made in section 10 of partnerships registered or unregistered and although it is the practice to assess firms as such, I can find *nothing to justify the argument that each partner in* a firm is not an assessee for he is a person by whom the income tax is payable, nor can I find anything to justify the argument that this assessee being a partner is not a person carrying on the business in question I am therefore prepared to hold that the present assessee is an assessee in respect of the profits and gains of the business which he carries on in partnership the words any business being open to either construction I must take that construction which looking at the whole Act, is the more rational and must construe any to mean each and every' It follows that an assessee is entitled to set off profits in one business against losses in another a partnership is not an

(8) *Board of Revenue v Munisami Chetty and Sons* 1 I T C 227
(9) 1 I T C 249
(10) 1 I T C 248
(11) 1 I T C 278

and, where any person fails to give the notice required by this sub section, the Income-tax Officer may direct that a sum shall be recovered from him by way of penalty not exceeding the amount of tax subsequently assessed on him in respect of any income, profits or gains of the business, profession or vocation up to the date of its discontinuance

(3) Where any business, profession or vocation[1] * * * * * on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is discontinued, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period Where any such claim is made an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference

(4) Where an assessment is to be made under sub-section (1) or sub-section (3), the Income-tax Officer may serve on the person whose income, profits and gains are to be assessed, or, in the case of a firm, of any person who was a member of such firm, at the time of its discontinuance, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section

(17) Repealed by the Income tax (Amendment) Act 1924 (XI of 1924)

'The determination depends upon whether it is a fact that the business of (the first firm) is being carried on in part by engaging with partners in the other firms When the subsidiary business engaged in is connected with the main business and is a proper employment of the assessee's capital or labour, it is in my judgment for the purpose of assessment to be treated as part of the business of the firm If the firm in one branch makes a loss that loss may be set off against the profits made in its head office or other branches'—Per *Schwabe C J* "Here we have a company (firm?) part of whose business is to hold a share in a separate business It takes this share in the course of its own business and it receives whatever profit it receives or loses whatever it loses in the course of its own business'—Per *Coutts Trotter J*[8]

In In re *Arjun Khemji & Co*[9]—also under the 1918 Act—it was held by the Judicial Commissioner of Nagpur that the share of a partner's loss in an unregistered firm can be deducted from his other income The same Court also held in *Seth Bal kishan Nathani* v *Commissioner of Income tax*[10] that losses suffered by an assessee as a member of a firm are to be taken into account in fixing the amount of his taxable income—under section 12 (1) of the 1918 Act (corresponding to section 14 of the present Act) As already observed there was no section in that Act corresponding to section 24 in the present Act

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(8) *Board of Revenue* v *Munisami Chetty and Sons* 1 I T C 227
(9) 1 I T C 249
(10) 1 I T C 248
(11) 1 I T C 2?8

entity known to the law its name is merely a convenient method of describing its partners each of whom is jointly and severally liable for its debts and for income tax purposes it is a convenient body to assess for this purpose no distinction can be made between registered and unregistered firms for whether a firm is a legal entity or not does not depend on registration Section 24 (1) is dealing with something quite different namely the allowance of set off between different heads mentioned in section 6 and not the allowance of set off between different businesses coming under one head Section 24 (2) again dealing with set off between different heads allows the partners of a registered firm where that firm has made a loss under one head and has not sufficient income under another head to avail themselves of this set off to use the loss to set off against their own individual incomes arising under other heads Whether this must be taken by implication to prevent such set off in the case of partners of an unregistered firm is a different question which does not arise here —Per *Schwabe C J*

Set off—Between different unregistered firms—

The question whether an unregistered firm can set off against its profits a loss sustained by another firm in which two members of the unregistered firm (and not the unregistered firm itself as such) are partners has been raised and held to be inconceivable [1] The law clearly does not permit an assessee to set off his profits against the loss of some other assessee This no doubt is based on the fact that a firm and its partners are different persons in the eyes of the Income tax law, but this theory was given up at least in part, in *Commissioner of Income tax v M Ar Ar Arunachalam Chetti* [13]

Succession—Set off—

The assessees who were a firm of three partners, carried on business in Ellore On 16th February, 1925, they started business in Madras in partnership with a fourth partner On 30th November 1926 the fourth partner retired and the other three who had the same shares in the Madras business as in the Ellore business carried on both the businesses It was *held* that on the facts the two firms were identical, and that under sections 26 and 24 set off should be allowed in respect of the assessment for 1926 27 (on the accounting year 1925 26) on the loss of the business in Ellore against profits in Madras [14]

Unabsorbed depreciation—

See rulings under section 10 (2) (*vi*) permitting the set off of unabsorbed depreciation under business against profits other

(12) *Commissioner of Income tax v Muthu K A P M Ramanathan Chetty and Karuppan Chetty* 2 I T C 194

(13) 1 I T C 98

(14) *M K M Mahomed Hassana Labai & Co v Commissioner of Income tax Madras* 3 I T C 431

heads of income, and also the set off of unabsorbed depreciation of a registered firm against the other income of its partners.

Assessee—Meaning of—

It will be noticed that in this section the word 'assessee' is not used in the strict sense of the definition in section 2 (2) but loosely in the sense of the person who is being assessed Obviously until set off has been allowed it is not possible to determine whether or not a person is liable to pay tax

Loss of 'profits'—As distinguished from loss of Capital—

See the Proceedings of the Assembly when the present Act was passed The reference to 'profits' is really superfluous but it was added in order to make it clear that no loss of capital could be taken into account

United Kingdom Law—

The right of set off in the United Kingdom is more restricted than in India Broadly speaking, it is allowed only in respect of trades (Rules under Schedule D—Cases I and II) and Mines, etc , under Schedule A

As a consequence of this restriction and also of the difference in the provisions relating to the exemption of charities, it has been held in various cases[1] that the profits of a business conducted by a charity cannot be set off against the loss incurred by the charity in other directions These rulings cannot apply in their entirety to India See, however, notes under section 4 (3) (i) and (ii)

25 (1) Where any business, profession or vocation[16] *on which income-tax was not at any time charged under the provisions of the Indian Income-tax Act, 1918,* is discontinued in any year, an assessment may be made in that year on the basis of the income, profits or gains of the period between the end of the previous year and the date of such discontinuance in addition to the assessment, if any, made on the basis of the income, profits or gains of the previous year

Assessment in case of discontinued business

(2) Any person discontinuing any such business, profession or vocation shall give to the Income-tax Officer notice of such discontinuance within fifteen days thereof.

(15) (e.g. [illegible] 4 Tax Cases 613 and other cases cited in [illegible] *Rotunda Hospital* 7 Tax Cases 87

(16) Inserted by the Income-tax (Amendment) Act, 1924 (XI of 1924)

and, where any person fails to give the notice required by this sub section, the Income-tax Officer may direct that a sum shall be recovered from him by way of penalty not exceeding the amount of tax subsequently assessed on him in respect of any income, profits or gains of the business, profession or vocation up to the date of its discontinuance

(3) Where any business, profession or vocation[17] * * * * * on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is discontinued, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period Where any such claim is made an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference

(4) Where an assessment is to be made under sub-section (1) or sub-section (3), the Income-tax Officer may serve on the person whose income, profits and gains are to be assessed, or, in the case of a firm, of any person who was a member of such firm, at the time of its discontinuance, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section

(17) Repealed by the Income-tax (Amendment) Act 1924 (XI of 1924)

History—

The amendment in 1924 simply rectified the defective drafting of the section which formerly provided for (1) the taxation of a discontinued business which was begun after 31st March, 1922, and (2) the taxation of a discontinued business which was in existence on the 31st March, 1922, and was at any time taxed under the Act of 1918, but did not provide for taxation on discontinuance of a business, which though in existence on the 31st March, 1922, was never taxed under the Act of 1918 The section now provides the method of taxing discontinued businesses (a) which were not taxed under the Act of 1918, and (b) which were taxed under the Act of 1918 Hence, it is now exhaustive

There was no corresponding section in the earlier Acts

New business—

As stated in paragraph 14, assessments under the Act are made on the profits of the "previous year" When a new business is started, therefore, no assessment will, as a rule, be made in the first year, and the assessment in the second year will be made on the profits of the preceding year The only exception is that referred to in the next paragraph (*Income tax Manual*, para 73)

Businesses not taxed under the 1918 Act—

The only exception to the general rule that assessments are made on the profits of the previous year is contained in section 25 (1) where, in order to guard against a possible loss of revenue owing to delay in making assessments on the profits of businesses, professions or vocations that close down during the course of a financial or commercial year, it is provided that in such cases in addition to the assessment on the income of the preceding year, a further assessment may be made in the year in which a business, profession or vocation is closed down, on the income of that year Sub section (2) of that section imposes a statutory obligation on persons discontinuing a business, profession or vocation to give notice of such discontinuance within fifteen days of the discontinuance

It is to be noted that these provisions apply only to business, professions or vocations, that is to say, to profits or gains taxable under sections 10 and 11, and further, that they only apply to any business, profession or vocation on which income-tax was not at any time charged under the provisions of the Indian Income tax Act, 1918 They do not apply to any business,

profession or vocation on which income tax had been charged under the provisions of that Act, as these are subject to the special provisions of section 25 (3) which are described below (*Income tax Manual*, para 74)

Power of assessment—Discretionary—

The power to make this additional assessment under section 25 (1) is a *discretionary power* which may be exercised whether the business, etc, is a purely temporary business commencing and closing down in the same year, or whether it is a business that has been in existence and has been previously taxed under the present Act It should only be used in cases where there is reason to anticipate that the tax may not be collected unless the assessment is made in the year in which the business, etc, closes down Where there is reason to believe that there *will be no difficulty in making the assessment and collecting the* tax in the usual manner, that is, in the year after the business closes down and on the profits of the year in which it did close down, there is no need to use the special powers conferred by this sub section (*Income tax Manual*, para 74)

Profits taxable and rate of tax—

The profits to be taxed under the provisions of section 25 (1) are the profits accruing between the end of the last "previous year" of which the profits have been taxed and the date of the discontinuance of the business Further, the rate to be applied in taxing the discontinued business under sub section (1) is the rate in force in the year in which the assessment is made

Businesses taxed under the 1918 Act—

Where a business, profession or vocation had tax charged on it under the provisions of the Income tax Act of 1918, the provisions of sub section (1) to section 25 cannot be brought into use for the assessment of any such business On the contrary, for reasons given in paragraph 13, it is, under the provisions of sub section (3) of section 25, not liable to tax in respect of profits or gains for the period between the end of the last "previous year" and the date of discontinuance, but is entitled to substitute the profits of that period for the profits of the last "previous year" For example, in the case of a business whose "previous year" ends on 31st March, if it close down on 31st March, 1923, its assessment for 1922 23 will be on the profits for the year ending 31st March, 1922, or at its option, on the profits of its year ending 31st March, 1923 If such a concern closed down on 30th April, 1922, it would still be assessed in the year in which it closed down, but the assessment would be on the year's profits

to 31st March, 1922, or at its option on the profits of the month of April, 1922 If, however, the concern's "business year" ends on 30th April and it closes down on 30th September, 1922, its assessment in the year 1922 23 would be on the profits of its year to 30th April, 1921, or at its option on its profits from 1st May, 1921 to 30th September, 1922 This special provision applies only to a business, profession or vocation on which tax was charged under the Act of 1918, and when a claim for this concession is made, it must be supported by proof that tax had been charged under the Act of 1918 in respect of that very business, profession or vocation

An assessee should be allowed the benefit of section 25 (3) if (1) he has (for example) both a business and a profession and discontinues only one of them, or (2) has more businesses than one and discontinues one or more, but not all of them, provided that they are genuine distinct businesses for which separate accounts are maintained, and not mere branches of a single business The section should, of course, only be applied to the income of any profession or business that is actually discontinued

A claim to be assessed under this sub section may be admitted if it is made not later than the end of the year following that in which the business, profession or vocation is discontinued (*Income tax Manual*, para 74)

Discontinuance different from succession—

The provisions of section 25 apply to the complete stoppage or discontinuance of a business, profession or vocation and do *not* apply to any change in the *proprietorship* Where there is any change in the proprietorship merely, the provisions of section 26 apply *See also* notes below and under section 26

Responsibility of partner for tax—

Where a business profession or vocation is completely discontinued and is not merely transferred from one proprietor or set of proprietors to another, the person who carried on the discontinued business is responsible for the payment of the tax, and where the proprietorship was vested in a firm, section 44 specifically provides that the persons who were members of the firm on the date of such discontinuance, are jointly and severally liable to any tax due from the firm

Effect of this section—

When the adjustment system was introduced in respect of income tax by the Income tax Act of 1918, it was not made retrospective Under section 19 of the Act no adjustment was to be made

in respect of tax *paid* or assessed before the Act came into force Consequently, so far as income from business (in fact all income not assessed at source) was concerned, in a sense, the income of the year 1917 18 ultimately escaped assessment altogether That is to say, no one ultimately paid tax calculated on the basis of the actual income of that year The tax for the year 1918 19 was assessed provisionally on the basis of the income of 1917-18 But when the actual income for the year 1918 19 was known, in the year 1919 20, this provisional assessment was adjusted by collection of the deficiency, or refund of the excess, in the provisional assessment, and thus tax was finally suffered on the actual income of the year 1918 19 In the year 1917 18 under the Act of 1886 the tax (though regarded as paid '*for*' the year 1917-18) was assessed *on* the income of the year 1916 17 As there was no adjustment in respect of this assessment, tax was finally suffered on the income of the years 1916 17 and 1918 19 but no tax was ultimately suffered on the actual income of the year 1917 18 But it is important to remember that under the Act of 1886 the assessment was made each year on the (statutory) income of the year of assessment (actually the income of the previous year) In the first year in which a business became liable to assessment—there being no previous year the assessment was made on an estimate [section 15 (2)], and an elaborate provision copied from the United Kingdom Act carried out this theory of assessment on the income of the year of assessment by providing (section 33, Act II of 1886) for an adjustment with reference to the actual income of the year of assessment, when a business was discontinued or its owner died, or became insolvent or owing to other "specific cause" was "deprived of or lost" the income on which the assessment was made The result was that, since no final assessment was made *in* 1918 19, and the income *of* 1918 19 was not finally assessed till 1919 20, by the latter year the final assessments had fallen one year behindhand A business opened in 1914 15, *e g*, would, up to and including 1919 20, have been assessed finally only 5 times on 6 years' working When therefore the adjustment system was abandoned on the passing of the Act of 1922, it was agreed that one final adjustment should be made in the year 1922 23, and *both* a final assessment or adjustment under the old system (retained for one year by section 68, second proviso, of the Act of 1922), and in assessment under the new system were made on the income of the year 1921 22 The result was that the assessments which had been lagging a year behind (so far as final assessments were concerned) were brought up abreast of the income again The

assessment under the new Act *in* the year 1922 23 was made *for* the year 1922 23

A company, however, did not pay tax in the first year of its existence, and stood therefore to gain a year's tax relatively to other businesses—*see* sections 11 and 15 of the 1886 Act

In regard to salaries, the position is different Under the Acts of 1886 and 1918, as under the present Act, the tax on salaries was deducted month after month as they were paid When the adjustment system was introduced, all that had to be done each year was to collect any deficiency or refund any excess tax on the previous year's salary, with reference to the amount actually deducted at source The tax on the salary of 1917 18 was deducted in 1917 18 In 1918 19, no provisional assessment was made on the salary of 1917 18 for the year 1918 19 Excess or deficient deductions were adjusted and the tax for 1918 19 was deducted in 1918 19 Similarly, when the adjustment system was abandoned on the introduction of the Act of 1922, there was no need to make an assessment to income tax on the salaries drawn in 1921 22 in addition to making an adjustment in respect of them In 1922 23 any excess or deficiency in the deductions made from salaries in 1921 22 was adjusted, and tax was deducted as usual from the salaries actually paid in 1922 23 In fact, so far as salaries are concerned, the system has remained the same under the three Acts of 1886, 1918 and 1922, except that under the present Act the collections on salaries, etc, are advance collections on account of the next year's liability to tax

The situation in regard to super tax is slightly different. Super tax was introduced in the year 1917 18 It was not at first liable to adjustment It was levied on the income of the previous year The adjustment system was first applied to super tax in 1920 21 Ultimately, the income of one year, *viz* 1919 20, was never taken as the basis for a final assessment to super tax owing to the adjustment system A provisional assessment was made on it in 1920 21, and in 1921 22 a final assessment was made by adjustment with reference to the income of the year 1920 21 The tax was thus shifted forward from the income of the year 1919 20 to the income of the year 1920 21 But, whereas in the corresponding year 1918 19 (the year in which the adjustment system was first applied to income tax) the income tax assessments became one year behindhand as explained above, in consequence of the new system, the situation in regard to super tax was different Since this had always been a tax on the previous year's income, it was *always* a year behindhand from the very start.

When the Act of 1922 came into force, and the final adjustment under the Act of 1918 (section 68 of the Act of 1922) and the first assessment under the new Act were made in 1922 23, the salaries, like the business incomes, of 1921 22 suffered super tax twice, once by way of adjustment and once by way of assessment The income tax assessments on salary income thus once again drew abreast of the income, but the super tax assessments were still a year behind

Under section 25 (3), a person discontinuing a business, profession or vocation, if he was at any time assessed under the Act of 1918, is entitled to claim that he shall not be assessed at all on the income of the period between the date on which he closes down and the end of the preceding 'previous year', or, if he prefers, that the income of that period shall be substituted for the income of the preceding previous year, and assessed as such and an adjustment made Thus, if a man closed his business on 31st March, 1925, he could claim not to be assessed on the income of the year 1924 25 or to have his assessment for 1924 25 (on the income of 1923 24) adjusted with reference to the income of 1924 25 The justification for this is as follows So far as persons assessed at any time under the Act of 1918 are concerned the "double assessment" in 1922-23 brought the assessments abreast of the income as already explained At the end of any year such a person has been assessed for precisely the same number of years as his business has been running If, therefore, he were assessed in the year after closing down, on the income of the last working year, he would be assessed for one year in excess But in the case of a business taxed for the first time under the Act of 1922, the tax collector is lagging a year behind because in the Act of 1922 there is no provision for assessment, on estimate, in the year in which a business is opened, as there was under the previous Acts Consequently, unless an assessment were made in the year after closing down on the income of the last year's working, the number of assessments would be one short It is clear that for the reasons stated, there was no need to extend the concession to salaried assessees so far as income tax was concerned Their assessments kept pace with their incomes all along and all that was done after the close of a year was to adjust any excess or deficiency So far as super tax is concerned, there does not appear to have been any real justification for extending the section to super tax at all The difference between income tax and super tax explained above seems to have been overlooked As already explained, a business assessee who started business in 1916 17, and was assessed in that year, and closed down in

1924-25, will be found to have been assessed to income-tax once for each year from 1916-17 to 1924-25, both inclusive, and hence it would be wrong to assess him in 1925-26 on the income of 1924-25. But a super-tax assessee in similar circumstances would have enjoyed nine years' income and been assessed only eight times including the assessment in 1924-25. Clearly, therefore, he should be assessed in 1925-26 on the income of 1924-25. The extension of this section to super-tax on income from business appears to have been due to misunderstanding or oversight. For the exact wording of this section it is the Joint Select Committee of 1922 that is responsible.

In all that has been said above it should be remembered that for the purpose of income-tax, companies taxed under the 1886 Act gained the tax on the first year of existence relatively to other businesses.

Effect of change of accounting year and discontinuance.—

This section leads to anomalous results in cases in which the assessee changes his accounting period and later on closes down his business. Ordinarily, when an Income-tax Officer permits an assessee to change his accounting year under section 2 (11), he would insist on the assessee not escaping tax for any period. Thus, taking the example of an assessee who keeps accounts by the year ending, say, 30th April and changes them to the financial year, the position will be as below (ignoring the period before 1921-22) —

Year of assessment, i.e., year for which tax is paid	*If accounting year unchanged Tax paid on income of*	*If accounting year changed Tax paid on income of*
1921—22	12 months ending 30-4-21	12 months ending 30-4-21
1922—23	12 „ 30-4-21	12 30-4-21
1923—24	12 „ 30-4-22	12 „ 30-4-22
1924—25	12 „ 30-4-23	12 30-4-23
1925—26	12 30-4-24	12 30-4-24
1926—27	12 30-4-25	12 30-4-25
1927—28	12 30-4-26	12 31-3-27
1928—29	12 „ „ 30-4-27	12 „ 31-3-28
For broken period—discontinued on say, 30-4-28	Nil	Nil
	i.e., profits for 17 months escape taxation, it will not pay to substitute his 17 months' profits for 12 months ending 30-4-26 (A)	i.e. profits for six months escape, and assessee can get refund for six months i.e. 12 months in all can escape (B)

Therefore, by changing the accounting year, the assessee pays extra tax on five months' profits. It is assumed in the argument throughout that a month's profit is constant.

Though the figures given above refer to a particular case, general formulæ can be deduced for (A) and (B) above (B) must always be 12 months while A cannot be less than 12 months nor more than 24 months according to the circumstances of each case An assessee who closed the accounts on 1st April and discontinued business on 30th March would escape tax for 23 months and 29 days Therefore he has nothing to gain and something to lose by changing over to the financial or other year

Such absurdities do not arise under section 25 (1), *i e*, in businesses not taxed under the 1918 Act The probability seems to be that in framing section 25 (3) regard was had only to accounts being maintained by the financial year, or it may be that the loss of tax in respect of discontinuance of businesses not keeping accounts by the financial year was deliberately accepted as the price for purchasing the consent of the commercial community to the abandonment of the adjustment system As already observed the Select Committee of 1922 is responsible for the wording of this section of the Act

This sub section indirectly continues the advantage, conferred on companies by the 1886 Act, of paying in the whole course of their existence tax for a year less than other businesses

Relief under section 60—

As a consequence of the insertion of the words "at the time of such assessment" at the end of clause (*b*) of section 14 (2) by Act III of 1928 an unintended hardship was produced in the case of partners of firms discontinuing business To remove this hardship the Governor General in Council has exempted under section 60, "such part of the profits or gains of a firm which has discontinued its business, profession or vocation as is proportionate to the share of an assessee in the firm at the time of such discontinuance, if tax has at any time been charged on such business, profession or vocation under the Indian Income tax Act, 1918 (VII of 1918), or if an assessment has been made on the firm in respect of such profits or gains under sub section (1) of section 25 of the Indian Income tax Act, 1922 (XI of 1922) "

Ephemeral associations—

This section is frequently applied, in practice, to assess touring companies, Liquor shop syndicates, Toll gate syndicates, etc, which generally consist of comparatively short lived businesses and which are not actually transferred from predecessor to successor This section coupled with section 34 gives the Income tax Officer the necessary powers to assess such incomes

If there is any continuity in any of these businesses, their assessment will be governed by section 26 and not by section 25

Temporary discontinuance—

The law does not recognise temporary discontinuance Either a business is discontinued or it is not

"Business is not confined to being busy "[18-23]

Limitation for putting in claim—

There is no period of limitation within which the assessee should put forward his claim under section 25 (3) If the claim is put forward within a reasonable time the claim should be allowed As to what is a reasonable time, see notes under section 29 See also *Income tax Manual*, para 74, set out on p 771

Decease of person carrying on Business, etc —

An assessee whose income *inter alia* was from a profession submitted a return which was accepted by the Income tax Officer Five days before the last day on which the tax was due under section 29, the assessee died The heirs claimed a refund of tax under section 25 (3) *Held*, that no application to the High Court lay under section 66 (3) as there was no refusal on the part of the Commissioner under section 66 (2), the latter arising only out of orders under sections 31 and 32, and the deceased in this case having accepted the assessment,—also *obiter* that "assessee" for such purposes includes persons representing a deceased's estate and that if tax is payable by the estate it can also claim a refund[24]

Discontinuance of business, etc —What is—

There is a certain amount of overlap in the decisions relating to what is 'discontinuance'—section 25—and what is 'succession'—section 26 The question is generally one of fact

For convenience, all the decisions are set out below, though some of them relate more closely to section 26 than to this section

The question of succession or discontinuance was of special importance under the English law in view of the system of taxing on the average of 3 years' profits, which was recently discarded, and many of the cases cited below arose in that connection The detailed provisions under the English law as to how profits are computed in cases of succession and discontinuance respectively are of no interest in India

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(18-23) *Per* Lord Sumner in the *South Behar Railway case*, 12 Tax Cases 657

(24) *Gopal Saran v Commissioner of Income tax*, 105 I C 506

Though the figures given above refer to a particular case, general formulæ can be deduced for (A) and (B) above (B) must always be 12 months while A cannot be less than 12 months nor more than 24 months according to the circumstances of each case An assessee who closed the accounts on 1st April and discontinued business on 30th March would escape tax for 23 months and 29 days Therefore he has nothing to gain and something to lose by changing over to the financial or other year

Such absurdities do not arise under section 25 (1), *i e*, in businesses not taxed under the 1918 Act The probability seems to be that in framing section 25 (3) regard was had only to accounts being maintained by the financial year, or it may be that the loss of tax in respect of discontinuance of businesses not keeping accounts by the financial year was deliberately accepted as the price for purchasing the consent of the commercial community to the abandonment of the adjustment system As already observed the Select Committee of 1922 is responsible for the wording of this section of the Act

This sub section indirectly continues the advantage, conferred on companies by the 1886 Act, of paying in the whole course of their existence tax for a year less than other businesses

Relief under section 60—

As a consequence of the insertion of the words "at the time of such assessment" at the end of clause (*b*) of section 14 (2) by Act III of 1928 an unintended hardship was produced in the case of partners of firms discontinuing business To remove this hardship the Governor General in Council has exempted under section 60, "such part of the profits or gains of a firm which has discontinued its business, profession or vocation as is proportionate to the share of an assessee in the firm at the time of such discontinuance, if tax has at any time been charged on such business, profession or vocation under the Indian Income tax Act, 1918 (VII of 1918), or if an assessment has been made on the firm in respect of such profits or gains under sub section (1) of section 25 of the Indian Income tax Act, 1922 (XI of 1922) "

Ephemeral associations—

This section is frequently applied, in practice, to assess touring companies, Liquor shop syndicates, Toll gate syndicates, etc, which generally consist of comparatively short lived businesses and which are not actually transferred from predecessor to successor This section coupled with section 34 gives the Income tax Officer the necessary powers to assess such incomes

it was *held* that the new owners were not entitled to be assessed as successors in the business of the previous owners

Per *the Lord President*—" There is no succession to any trade, manufacture, adventure, concern or profession There is simply the purchase of a corporeal moveable which may or may not carry on the same business which may be put equally well to a different trade if the contention were to apply, it would equally apply to a house bought in open market or to a carriage knocked down at a sale "[30]

A tramway company was incorporated under a local Act Later on, this was taken over by another company which also ran an omnibus service Finally, the local authority acquired the tramway and extended it and substituted electric for horse drawn vehicles *Held*, that the tramway succeeded to the business of the company

Per *Bray, J*—"Railway companies are always spending capital and extending their railways and some of them have substituted electrical power for steam but it could not be suggested that by doing this they were commencing or setting up a new business It so happens here that the extension and modification was very great and that it occurred just at the time when the respondents had bought the original undertaking but I do not think this alters the case There seems no reason why the revenue should be benefited by the accident of transfer at the time "[31]

There can be no succession to a part of a business[32] This does not imply however that if what is succeeded to is not the same extent of trade or even does not include a particular line of customers, it necessarily follows that there cannot be a succession to the trade *Held*, accordingly in a case of a trading company which took a lease of the brewery of another company and their tied houses but did not take their free trade or goodwill that the decision of the Commissioners that there was a succession could not be upset[33]

The National Provincial Bank purchased the business of the County of Stafford Bank The former had several Branch Establishments in England and Wales while the latter had only one Office at Wolverhampton A large sum was paid for good will, premises, furniture, etc, and the Manager and the former staff of the Stafford Bank were taken over by the National Bank Profits earned at the Wolverhampton Branch were merged in and formed part of the general profits of the National Provincial Bank without distinction as to source or origin of profits *Held*,

(30) *Watson Brothers v Lothian* 4 Tax Cases 441
(31) *Stockham v Wallasey District Council* (1906) 95 L T 834
(32) *Stockham v Wallasey District Council* 95 L T 834
(33) *Shipstone and Sons v Morris* 8 A T C 261

that there was a "succession" by the National Provincial Bank to the business of the Stafford Bank

Per *M of R*—"The great point urged by Mr Dunckwerts in a very elaborate argument before us, was that the question whether there was a succession or not must be a question of fact and the Commissioners must be taken in this case to have found as a fact that there was no succession and he relies upon the authority of a case decided in Scotland of *Ferguson v Aitkin* as showing that it is and must be a question of fact whether there has in point of fact been a succession or not It may be in many cases or in some cases at all events, a question of fact But it seems to me for the reasons I have already given that if it was a question of fact for the Commissioners in this case they have deliberately not decided it They have presented to us a problem of law, and they have given us the benefit of their opinion upon it, and if we do not agree with that we are entitled to say so In my view if this is a finding as I think it must be of law that there is no succession within the meaning of the Rule I find myself unable to agree with it for the reasons I have given The fact that in a particular case, which was a rather exceptional case, in Scotland (which I need not go into) the Court held that the Commissioners having found that there was no succession in point of fact they were bound by that decision and disinclined to go behind it in my opinion presents no difficulty in this case"[34]

Under its Articles of Association a Steamship Company could own only one ship at any one time, but was empowered on the loss or disposal of such ship to acquire and trade with another ship The "Merchiston", the first ship owned by the Company, was lost in April, 1906, and in the following month an order was given for another ship, the "Verastou", which commenced her first voyage in October, 1906 *Held*, that the business of the Company was continuous

Per *Bray J*—"I only say with regard to the finding of the Commissioners that it seems to be based entirely upon a misapprehension and therefore I cannot look upon their finding as a distinct finding upon a question of fact upon which there is no appeal I think I have all the facts before me and can determine what is the proper conclusion of law to be drawn from them"[35]

Before the outbreak of the Great War in 1914 the assessee Company had been engaged in completing old contracts entered into by a firm of contractors whose business it had been formed to take over in 1912 The Company had obtained no fresh contracts itself The business premises of the Company were closed down during the year 1913, and offered for sale, but without success The premises were eventually taken over and ultimately purchased by the War Office in December, 1914 From December,

(34) *Bell v The National Provincial Bank of England Ltd.*, 5 Tax Cases 1
(35) *The Merchiston Steamship Co, Ltd v Turner*, 5 Tax Cases 520

1914, until February, 1920, the Company had neither works nor plant, but during that period persistent and continuous efforts were made by its directors on its behalf to obtain contracts Their efforts however were unsuccessful until early in 1920 when, as the result of the introduction of fresh capital into the Company and the adoption of a different business policy, a number of profitable contracts were obtained, and fresh plant acquired All through, the Company had retained its registered office and held its annual statutory meetings regularly and paid the secretary's salary and directors' fees It had also spent substantial sums, including those incurred by the directors in connection with their abortive efforts to obtain contracts The Commissioners held that there was no trade carried on by the Company between 1914 and 1920, that the trade which was taken over by the Company was discontinued in 1914, and that a fresh trade was set up and commenced in 1920 *Held*, on appeal, by the High Court—

(i) that the question involved was one of law,

(ii) that, notwithstanding the Company's failure to obtain contracts between the years 1914 and 1920, there was no discontinuance of its trade, and

(iii) that a new trade was therefore not set up and commenced in 1920

Per *Rowlatt, J* — Because in the middle of a great career a Company or still more an individual professional man might have a year when he was holding himself out for business or the Company was holding itself out for business but nothing came yet that would not effect a break in the life of the company for Income tax purposes It is not a question that the field of business was not precisely the same

I think that really it is a question of law in the sense that the Master of the Rolls laid down in Bell's case (*Bell v National Provincial Bank of England*[36]) the finding is that upon the construction of the Rule the case is not within it It is not really a question of fact or even of mixed law and fact "

The owner of a steam drifter employed in herring fishing was taken over by the Admiralty compulsorily on hire, and it was held that notwithstanding the different use to which the ship was put by the Admiralty the owner carried on the same business as before, *viz*, using the ship for profit in ordinary ship owning business[37]

A firm of timber merchants and saw millers bought a saw mill which also did joinery business and transferred to that place the direction of their own business At the time the saw mill

(36) 5 Tax Cases 1

(37) *Kerr and Randall, Ltd v Dunn*, 8 Tax Cases 663

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A firm of timber merchants and saw millers bought a saw mill which also did joinery business and transferred to that place the direction of their own business At the time the saw mill

(36) 5 Tax Cases 1

(37) *Kerr and Randall, Ltd* v *Dunn*, 8 Tax Cases 66

was acquired, there was acute trade depression and there were no current orders with the mill The purchasing firm took over no books, no list of customers and none of the staff, except a few woodmen The new firm could not even identify whether orders came from the customers of the vending firm or not The price paid for the concern was based only on the value of the tangible assets but the contract of sale referred to it as including goodwill Also, a joint circular was issued by the purchasing and selling firms together that the purchasing firm succeeded to the business *Held*, that the question whether there was a succession was a question of fact [38]

Per *the Lord President* — I do not propose to attempt a definition of succession but it is, I think safe to say two things about it In the first place it does not include the accidental acquisition by a trader who continues in business of the custom left by another who goes out of business A trader might give up or go out of the trade for some reason without attempting to realise or transfer goodwill and the result of that might be the capture of some custom theretofore attached to him by one or more of his competitors who continued to trade On the other hand—and in the second place—I think the word 'succession' does cover any case of the transfer by one trader to another of the right to that benefit which arises from connection and reputation The question whether there is in any particular case a succession or not is a question of fact [38a]

In *Fullwood Foundry Company* v *Commissioners of Inland Revenue*[39] also it was held that succession was a question of fact and that the court could not interfere if there was any evidence before the Commissioners to support their finding

A Company which was started in 1919 went into voluntary liquidation at the end of 1922 On 21 2 23 the liquidators agreed to sell to a new company all the assets, and the agreement to transfer the business was effected on 20 7 23 The new company was taxed for the period 1 4 22 to 31 3 23 *Held*, that on the facts, there was no 'discontinuance' of the business but only a 'transfer or succession', and that section 25 (3) did not apply [40]

A partition took place in a Hindu family doing business, the sons separating from the father The account books of the family business remained with the father, who continued the business in its old name and had the right to realise old outstandings

(38) *Sutherland* v *Commissioners of Inland Revenue* (1918) S C 788 12 Tax Cases 63

(38 a) *Thomson and Balfour* v *Le Page* 8 Tax Cases 541

(39) 9 Tax Cases 101

(40) *Commissioner of Income-tax Bombay* v *M H Sanjana & Co Ltd* 2 I T C 110

No branch was closed *Held*, that there was a succession and not discontinuance [41]

A business formed largely of employees of a previous business, and conducted in different premises, the former business having been given up by the owner and the premises pulled down, the new business not taking over any assets, stock or book debts, contracts or liabilities of the old business, nor having paid anything for the goodwill but dealing mainly with the customers of the former business was held to be a case of discontinuance and not succession One test, suggested by Rowlatt, J, was whether a business is split up according to categories or according to customers, in the latter case the business is dissipated [42]

One cannot separate business simply because customers are separate or they pay on different bases The more important tests are whether the accounts are the same and include all the transactions, whether the actual management and control are the same There may be a succession to a business even though one of the previous partners takes away part of the custom

A business in the hands of a company was advertised for sale and went into liquidation A firm connected with the old directorate bought the stock in trade and premises but, for certain collateral reasons, placed a very small value on the stock in trade There was no interregnum and the old servants continued under the new employers Nothing was said about book debts and trade liabilities The Commissioners held that "the appellants acquired no more than certain premises together with a very small amount of stock and proceeded to carry on therein a trade similar to but not identical with that formerly carried on by the company" Rowlatt, J, declined to interfere [43]

To constitute succession, it is not necessary that the assets of the predecessor should be acquired by the successor On the other hand, even though goodwill be one of the assets so acquired, the case is not necessarily one of succession There is no conclusive test, and it is a question of fact in each case with reference to all the circumstances The gap in time between the old and the new businesses may sometimes be an important clue [44]

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(41) *Kalu Mal Shori Mal v Commissioner of Income tax Punjab* 3 I T C 341 Cases 73

(42) *Mills from Frielie, Ltd v Commissioners of Inland Revenue*, 12 Tax Cases 73

(43) *Wilson and Barlow v Chibbett* 8 A T C 174

(44) *Reynolds v Oyston (C of I)* 9 A T C 5

Discontinuance—Meaning of—

In *Nihal Chand Kisorilal v Commissioner of Income tax, United Provinces*,[45] the Allahabad High Court ruled that 'discontinuance' as used in section 44 "may consist of various forms It may mean total abandonment or extinction, it may mean self-extinction for the purpose of reconstruction under another form" This is presumably not intended to do away with the difference between discontinuance for the purpose of section 25 and succession for the purpose of section 26

Discontinuance—Part of business—Question of fact—

'Discontinuance' like 'succession' is a question of *fact* Whether a firm carried on one business or more than one—which is often a preliminary issue in determining whether there has been discontinuance or not—is also necessarily a question of fact to be determined by the Income tax authorities In *Howden Boiler and Armaments Company v Stewart*[45-a] the Company, originally a firm of boiler makers, manufactured armaments for some time and gave up the latter business after some time The General Commissioners held that it was all one business though with two departments (as all the accounts were brought into a single account) and the High Court declined to interfere on the ground that the question was one of fact

Part of business—Discontinued—How treated—

If there are two separate businesses or professions carried on by the assessee and, one is discontinued, this section should evidently be applied as though there were two separate assessees conducting each business but at the same time the assessee should evidently not be deprived of the right of 'set off' under section 24 That is, two separate assessments should be made as though there were two assessees and the assessments consolidated

[45b] **25-A** (1) Where, at the time of making an assessment under section 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and, if he is

Assessment after partition of a Hindu undivided family

(45) 2 I. T C 338

(45-a) 9 Tax Cases 205

(45 b) Inserted by section 4 of Act III of 1928

satisfied that a separation of the members of the family has taken place and that the joint family property has been partitioned among the various members or groups of members in definite portions, he shall record an order to that effect

Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family.

(2) Where such an order has been passed, the Income tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no separation or partition had taken place, and each member or group of members shall in addition to any income-tax for which he or it may be separately liable and notwithstanding anything contained in sub-section (1) of section 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it,

and the Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of section 23

Provided that all the separated members and groups of members shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such

(3) Where such an order has not been passed in respect of a Hindu family hitherto assessed as undivided, such family shall be deemed for the purposes of the Act, to continue to be a Hindu undivided family

History—

This is a new section inserted by Act III of 1928 to fill a lacuna in the Act The words "*assessed as*" *after* "*hitherto*" in sub section (1), and the whole of sub section (3) were added, and the words "before the end of the previous year" after "portions" in sub-section (1) deleted by Act XXII of 1930.

These were all drafting amendments intended to make the section more accurate and clear

Object—

In the absence of this section it is not possible to assess a Hindu undivided family—except in cases of succession to business, etc, under section 26—on the profits of the period dating from the last day up to which the family has been assessed up to the date of partition This is because while section 14 exempts the members the family also cannot be got at having ceased to exist

Scope of the section—

It will be noticed that the Income tax Officer will presume the continuance of the Hindu undivided family till the contrary is claimed by some one and accepted by the Income tax Officer, and that before the Income tax Officer recognises a partition he should give an opportunity to all the members of the family (including member groups) As regards the service of notice, see section 63

It will be observed that though each individual member or family has to pay his or its share of the tax of the undivided family, the *rate* of tax is that applicable to the undivided family

When both sections 25 A and 26 apply—

If the partition of a Hindu family is accompanied by a succession in the family business, the section to be applied is clearly section 26 and not section 25 A Historically section 25 A is later than section 26, and was intended only to cover cases not already covered by section 26 Also, section 26, being placed later than section 25 A, should override it

Separation or partition—

Sub section (1) requires that there should be a separation in status and also a partition of property in definite portions

Change in constitution of a firm

26 (1) Where, at the time of making an assessment under section 23, it is found that a change has occurred in the constitution of a firm or that a firm has been newly constituted, the assessments on the firm and on the members thereof shall, subject to the provisions of this Act, be made as if the firm had been constituted throughout the previous year as it is constituted at the time of making the assessment,

and as if each member had received a share of the profits of that year proportionate to his interest in the firm at the time of making the assessment

Change of ownership of business

(2) Where, at the time of making an assessment under section 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year

History—

This section was completely recast by Act III of 1928 The old section that was in the Act since 1922 was as below —

"Where any change occurs in the constitution of a firm or where any person has succeeded to any business, profession or vocation, the assessment shall be made on the firm as constituted, or on the person engaged in the business, profession or vocation, as the case may be, at the time of the making of the assessment "

That section led to two kinds of difficulties *Firstly,* as regards firms the constitution of which had been changed, the departmental procedure was to distribute the income of the firm between the partners with reference to the position on the date of assessment The Bombay High Court held in *Mellor's case*[45c] that this procedure was illegal and that the distribution should be made with reference to the position during the 'previous year', that is, when the income that is taxed was earned That case related to super tax payable by the partners of a registered firm It was then decided to regularise the departmental practice by legislation but, instead of amending section 26, it was considered sufficient to insert a proviso to section 56 to the effect that the profits of a registered firm during the previous year shall be deemed to have been received by the partners in proportion to their shares at the time of assessment At the same time in other provinces than Bombay the ruling in *Mellor's case*[45d] was not followed in respect of income tax The result was that as regards super tax the profits were taxed in all provinces with reference

(45 c) 1 I T C 320
(45 d) *Ibid*

to the partnership at the time of assessment, and that as regards income tax, while in Bombay the assessment was made with reference to the constitution of the firm in the previous year, in all other provinces the criterion followed was the constitution at the time of assessment This divergence in practice also led to confusion as to the deeds of partnership to be called for by the Income tax Officer for the purpose of registration The new section as it stands now places the whole matter on a satisfactory footing The assessment is to be made under this section, both as regards super tax and as regards income tax, with reference to the constitution at the time of assessment That is, it will be assumed that the firm had been constituted throughout the previous year as at the time of assessment, and that the partners at the time of assessment had received shares of profits proportionate to their shares at the time of assessment Occasion was also taken to provide for firms newly constituted during the previous year The proviso to section 56, which became unnecessary, was omitted

Secondly as regards succession to a business, profession or vocation, it was ordinarily the departmental practice to tax the successor as though the business, etc, had been continuous, and as though he had received the predecessor's profits That is to say, while the profits were computed as if the predecessor had continued in the business, etc, the tax was computed with reference to the status of the successor In *Begg Sutherland & Co v Commissioners of Inland Revenue*[46] and *Nehal Chand Kishorilal v Commissioner of Income tax*,[47] the Allahabad High Court held that the section was a bare machinery section, and that the tax should be computed as though the predecessor was still in existence at the time of assessment and the tax recovered from the successor According to this view, it would follow that if a registered firm was succeeded by a company the latter need not pay Company super tax in the first year of its assessment Similarly if an unregistered firm succeeded a registered firm, the former need not pay super tax in its first assessment On the other hand, if a registered firm succeeded a company or an unregistered firm or an individual, it must pay super tax in the first year, though it need not, as a registered firm, pay any super tax A directly contrary view was taken by the Bombay High Court in *The Western India Turf Club case*, [48] in which the Court held that when an association of individuals was succeeded by a company the latter need not pay super-tax at the graduated rate

(46) 2 I T C 30
(47) 2 I T C 338
(48) 2 I T C 227

on the predecessor's profits The Crown appealed against the Bombay High Court ruling to the Privy Council, who upheld that ruling on the ground that the liability to tax does not arise until after the passing of the Finance Act, which was long after the succession It is only when the Finance Act has been passed that it is possible to say at what rate a person is to pay tax in a given year At the time of succession, no one can say what would be the rates of tax in the next year Sub section (2) gives effect to the Privy Council decision and makes the position clear, *viz*, that the rate of tax is to be determined by the status of the successor

Change in constitution—Firm—

This section applies only to those cases in which the firm itself, *i e*, the partnership continues but there is a change in the partners including cases of changes merely in the shares of the partners even though the partners themselves may not change But if the firm itself, *i e* the partnership, changes as the result of a dissolution of the previous partnership—*see* section 253 of the Indian Contract Act and notes under section 2 (14)—the *first* part of this section will not apply Cases of that kind will be covered by the *second* part of the section and the new partnership will be treated as having succeeded to the old partnership

The date on which a partnership is dissolved is a question of fact Even though an agreement may provide for the dissolution on a certain date, the partnership may in fact continue beyond that date [49]

Hindu undivided family—Associations of individuals etc —

Section 25 A deals with the assessment of Hindu undivided families immediately after partition Section 26 (1) deals with changes in the constitution of a firm and section 26 (2) with all cases of succession to a business profession or vocation It will be seen that there is no provision for cases of changes of membership or constitution of other associations of individuals

Business profession or vocation—

As regards the meanings of these expressions, *see* notes under sections 2 (4) and 4 (3) (*ii*) This section applies only to cases of succession to business, profession or vocation The first half of the section, *viz* that which relates to the change in the constitution of a firm, applies to all cases irrespective of what are the activities of the firm and its sources of income The

(49) *Barclay (Michael) Rogers and Biller v Carter* 11 Tax Cases 565

second part of the section applies only to cases of succession to business, profession or vocation Where a person succeeds to income under other heads than from a business, profession or vocation, this section will not apply, and the taxing authorities can only tax the actual person who received the income in question or to whom it accrued and not the person who has succeeded to the property or securities or income from other sources, as the case may be

Accounting year—Change of—Succession—At the time of—

As regards the right to claim a change of accounting period, *see* notes under section 2 (11) (*a*) When a firm is converted into a company, or a company into a firm, the new company (or firm) is evidently a new assessee, so far as the proviso to section 2 (11) (*a*) is concerned, and consequently has the right to choose its own accounting period for the assessments on the profits of the period subsequent to the transfer The contrary inference is however indicated by the rulings of High Courts in regard to the right of a successor to claim unabsorbed depreciation and to base the depreciation allowance on the cost paid by the predecessor *See* notes under section 10 (2) (*vi*)

Where a change in accounting year accompanies a succession, all profits since the date up to which the predecessor was last taxed in the usual course are taxable in the hands of the successor, as though he had received all the profits That is the intention of sub section (2) as inserted by Act III of 1928

"When in the year in which the first assessment is made after succession to a business has occurred, the successor wishes to adopt a different accounting period from his predecessor's, the request should be treated as involving a change of accounting period If the result of this change is to leave an interval between the end of the last complete accounting period of the predecessor and the beginning of the first accounting period of the successor, the Income tax Officer should permit the change of accounting period only on the condition that a separate assessment is made on the income of the interval in addition to the assessment on the income of the first accounting period of the successor The income of the interval, however, should be assessed at the rate applicable to the income of the first accounting period taken separately or at the rate applicable to the income of the interval taken separately whichever rate is less The income of the interval and that of the first accounting period should not be lumped together and assessed together at the rate applicable to their aggregate." (*Income tax Manual*, para. 75)

Business outside British India—

Section 26 applies as much to firms outside British India as to firms in British India Sections 4 (2), 14, 16 and 26 should be read together Section 4 (2) enacts when the profits of a foreign firm are taxable, and section 26 states whom you have to reach to collect the tax *Section 26 applies to all cases of* succession in business, etc, irrespective of the status of the predecessor and the successor and their mutual relationship It, therefore, covers a case in which a business conducted by a Hindu undivided family falls to a member on partition as his share

If, on a partition, a business conducted by the Hindu undivided family is allotted to a member of the family as his share *as a going concern, i e*, without the books being closed and the profits ascertained and capitalised, the profits of the business which may have accrued before the partition are profits in the hands of the member and not capital

Held, therefore, in a case in which on the partition of a Hindu undivided family, which did business abroad (in partnership with outsiders), the share of the family in the partnership was allotted as a going concern to a member of the family as his share, that profits received by the member in British India after the partition were taxable, even though the profits accrued abroad *before partition*

It was also held that the foreign profits received by the family before the partition were not taxable in the hands of the member, because section 25 A had not been introduced into the Act at that time[50]

'Escaped' income of predecessor—Section 34—Application of—

Under section 34, the Income tax Officer can, within one year from the end of the fiscal year, make a supplementary assessment on the person liable to the tax which has escaped Where there has been a succession, can the Income tax Officer make a supplementary assessment on the successor *in respect of the* predecessor's 'escaped' income?

Splitting up and amalgamation of businesses—

Where two or more firms coalesce into a single firm or company, i e, where two or more businesses or professions are merged, set-off should obviously be allowed of the losses, if any, of the constituent businesses when taxing the combined business in the first year of its existence The tax should be computed as though the successor had himself conducted all the businesses and

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(50) *I R S A K Arunachallam Chettiar v Commissioner of Income tax, Madras* 57 M L J 300 (F B)

received the profits and borne the losses[1] Where a business is split up, it should be remembered that there can be no succession to a part of a single integral business or concern Therefore, if a part of a business only has been transferred and the predecessor continues to carry on the business, the predecessor is liable to tax on the entire profits up to the date of the transfer Whether the business is one or more than one is a question of fact, and if the predecessor had two or more separable businesses, and one or more of them have been transferred, then the successor is liable in respect of the predecessor's profits in the transferred business or businesses The successor can set off his own loss under other heads of income against the profits of the transferred businesses and *vice versa* When a business is split up, it is not correct to make a single consolidated assessment on it and then distribute the tax between the successors of the different parts

All these inferences seem to follow from the Privy Council ruling in the Western India Turf Club case cited *supra*, which the present section embodies

Succession by inheritance—

Both the sub sections of this section start with the words "Where, at the time of making an assessment under section 23," It will be seen from *Sir Henry Procter's case* set out under sections 29 and 46 that the Bombay High Court have held that no assessment can be made on a deceased person Proceedings under sections 22 and 23 automatically lapse if an assessee dies before the assessment is completed The question therefore whether proceedings can be started against a successor by inheritance still remains to be decided by courts

United Kingdom Law—

The law about the computation of profits in cases of succession in the United Kingdom is, broadly speaking, that profits should be reckoned as though there had been no change in the succession, but if the new partners or person succeeding can prove reduction of profits due to 'specific cause' as the result of the change in the ownership of the business, allowance will be made The rule is the same for companies as for individuals and firms (*See* Schedule D, Cases I and II, Rule 11, and Schedule D, Miscellaneous Rules 3 (3), section 237 of the Income tax Act of 1918, General Rules, Rule 1)

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(1) *Hassana Labbai & Co v. Commissioner of Income tax, Madras*, 3 I T C 341

Most of these complicated rules were connected with the (now discarded) United Kingdom system of computing profits on the average of three years, and the provisions are therefore of no interest in India The only relevant rules and decisions are those relating to the difference between 'discontinuance' and 'succession' which have been set out under section 25 *See also* notes under section 44

Procedure in registration of firms

26-A. (1) Application may be made to the Income-tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax

(2) The application shall be made by such person or persons, and at such times and shall contain such particulars and shall be in such form and be verified in such manner as may be prescribed , and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed.

History—

This section was introduced by Act XXI of 1930 Formerly the conditions and the procedure were regulated by the definition in section 2 (14) and the rules framed thereunder The definition in section 2 (14) has now been simplified *See* section 2 (6 A) as to the definition of a "firm"

Rules—

Rule 2—*Any firm constituted under an instrument of* partnership specifying the individual shares of the partners may, for the purposes of clause (14) of section 2 of the Indian Income tax Act, 1922 (hereinafter in these rules referred to as the Act), register with the Income tax Officer the particulars contained in the said instrument on application in this behalf made by the partners or by any of them

Such application shall be made—

(*a*) before the income of the firm is assessed for any year under section 23, or

(*b*) if no part of the income of the firm has been assessed for any year under section 23, before the income of the firm is assessed under section 34, or

(c) with the permission of the Assistant Commissioner hearing an appeal under section 30, before the assessment is confirmed, reduced, enhanced or annulled, or, if the Assistant Commissioner sets aside the assessment and directs the Income tax Officer to make a fresh assessment, before such fresh assessment is made

Rule 3 —The application referred to in rule 2 shall be made in the form annexed to this rule and shall be accompanied by the original instrument of partnership under which the firm is constituted together with a copy thereof provided that if the Income tax Officer is satisfied that for some sufficient reason the original instrument cannot conveniently be produced, he may accept a copy of it certified in writing by one of the partners to be a correct copy, and in such a case the application shall be accompanied by a duplicate copy

FORM I

Form of application for registration of a firm under section 2 (14) of the Indian Income tax Act, 1922

To

THE INCOME TAX OFFICER

Dated 19

I/We ———————————beg to apply for the registration of my/our firm under section 2 (14) of the Indian Income tax Act 1922

2 The original/A certified copy of the instrument of partnership under which the firm is constituted specifying the individual shares of the partners together with a copy/duplicate copy is enclosed The prescribed particulars are given below

3 I/We do hereby certify that the profits for the year ending have been or will be actually divided or credited in accordance with the shares shown in this partnership deed.

Signature———————

Address———————

Name and address of the firm	Names of the partners in the firm with the share of each in the business	Date on which the instrument of partnership was executed	Date if any on which the instrument of partnership was last registered in the Income tax Officer's Office	Remarks

I/We ——————— do hereby certify that the information given above is correct

Signature(s)———————

Rule 4—(1) On the production of the original instrument of partnership or on the acceptance by the Income tax Officer of a certified copy thereof, the Income tax Officer shall enter in writing at the foot of the instrument or copy, as the case may be, the following certificate, namely —

"This instrument of partnership (or this certified copy of an instrument of partnership) has this day been registered with me, the Income tax Officer for in the province of under clause (14) of section 2 of the Indian Income tax Act, 1922 This certificate of registration has effect from the day of April 19 up to the 31st day of March 19 "

(2) The certificate shall be signed and dated by the Income tax Officer who shall thereupon return to the applicant the instrument of partnership or the certified copy thereof, as the case may be, and shall retain the copy or duplicate copy thereof

Rule 5—The certificate of registration granted under rule 4 shall have effect from the date of registration

Rule 6—A certificate of registration granted under rule 4 shall have effect up to the end of the financial year in which it is granted, but shall be renewed by the Income tax Officer from year to year on application made to him in that behalf at any time before the assessment of the income of the firm is made, and accompanied by a certificate signed by one of the partners of the firm that the constitution of the firm as specified in the instrument of partnership remains unaltered

Extract from First Select Committee s Report—

' As regards the subject matter of the new section we have considered very carefully the provision originally made in sub section (3) allowing an Income tax Officer to refuse registration to any association of individuals which is in his opinion not a firm We think in the first place that such a provision is unnecessary in view of the provisions of sub section (1) of the new section 23 A which gives power to the income tax authorities to treat the members of a firm as individuals ignoring the constitution of the firm as such and of his undoubted power under the Act as it now stands to refuse registration to a concern which on the face of the deed of partnership is not a firm as defined in the Act In addition to this we observe that there is undoubtedly a large body of opinion which holds that the sub section would place in the hands of

Income tax Officers a power which although it might not in actual practice be abused is liable to be misconceived and thus to hamper and discourage the formation of perfectly genuine partnerships for business purposes At the same time we realise that it should not be possible for persons to obtain registration of an enterprise as a registered firm which is in fact nothing more than a one man concern and we think the object in view can be satisfactorily met by making provision for the verification of an application for registration and by imposing by an amendment of section 52 of the Act a penalty upon any one who makes a false verification

Application to be made before assessment—

Till November, 1926, the application for registration had to be made before the date on which the return was due under section 22 (2) If it was made after that date, even if the application was accepted by the Income tax Officer, it did not affect the assessment on the return and the assessment was made as if the firm was an unregistered firm In November, 1926, rule 2 was altered so as to permit of applications of registration being made at any time before assessment The rule was again altered into its present form in 1928 so as to remove certain obscurities and make it clear when registration could be made and when not It will be noticed that a firm which has concealed a part of its income during its ordinary assessment under section 23 is not eligible for registration in respect of its supplementary assessment under section 34

In *Hussainbhai Bohari v Commissioner of Income tax* it was held by the Additional Judicial Commissioner, Central Provinces, that a certificate of registration granted before April in respect of the year commencing 1st April is not void

Registration—Application for—Signature of—

The application for registration under rule 2 as well as the application for renewal of the registration under rule 6 need be signed by only one of the partners of the firm The application should be signed by a partner who is still a partner at the time when the application for registration is made

Instrument of partnership—Registration of—

The instrument to be produced before the Income tax Officer to secure the registration of a firm need not be a registered instrument under the Indian Registration Act The registration by the Income tax Officer has nothing to do with registration under the Registration Act The Income tax Officer as such is not concerned with the fact that the document is insufficiently stamped or requires to be registered under the Indian Registra-

(°) 2 I T C 43

tion Act and need not reject such documents as not being legal evidence since they are not adequately stamped nor accept them as being legal evidence merely because they are properly stamped or registered His duty is to satisfy himself that the transaction evidenced by the instrument is genuine and then act accordingly. He is not bound by the technicalities of the Indian Evidence Act—see notes under section 23 As a Public Officer, however, it is incumbent on the Income tax Officer to impound a document that comes before him if it is insufficiently stamped—*see* section 33 of the Indian Stamp Act

Deed of partnership—Which to be produced before Income-tax Officer—

The ruling of the Bombay High Court in *Mellor's case*[3] and the amendment of the Act in 1925 so as to get over that ruling only so far as it related to super tax, coupled with the non observance of the ruling in *Mellor's case* even in regard to income tax outside the Bombay Presidency, had led to considerable confusion in practice The deed of partnership regulating the distribution of the profits that were being taxed, as well as the deed in force at the time of assessment, had to be produced before the Income-tax Officer when there was any change in the constitution of the firm All these difficulties have now disappeared, section 26 having been so amended by Act III of 1928 as to cover both super tax and income tax The deed of partnership to be produced now is in all cases the deed in force at the time of assessment

Instrument of partnership—Whether can be implied—

"Ordinarily a contract for a term constituted by a written agreement must be considered as having come to an end at the expiration of the period for which it was entered into and the contract during the term differs from that which arises from the continuance of the relation by the mutual consensus of the parties after the term has expired The one is to last for a certain term the other only for so long a time as they both shall choose Am I then by any principle of law bound to assume or justified in assuming that all the special articles and conditions in the original written deed of partnership for a term are at once transferred by law to this new contract which has no particular limit to the time of its duration? That would be a strong and extravagant assumption, and one that is not warranted by any principle or authority "[4]

Per Lord Selborne in *Neilson* v *Mossend Iron Co*[5]—"There is no doubt about the law that when there is a partnership for a term of

(3) 1 I T C 320
(4) *Per* L C Westbury in *Clarke* v *Leach*, 1 D G J & S. p 44
(5) 11 A C 298

years, and it is afterwards after the expiration of the term continued at will, the rule in the absence of a contract to the contrary, is that it may be presumed that the new business is carried on upon the old terms as far as they are applicable to it, and only so far and as far as the principle is concerned I do not think there is any discrepancy between any of the authorities"

Following the above—and in the absence of anything in section 256 of the Indian Contract Act to the contrary—the Madras High Court held in *M V Krishna Ayyar and Sons v Commissioner of Income tax*[6] that where a written instrument of partnership expired and the partnership was continued without any break, or change in personnel, there was no written instrument within the meaning of section 2 (14) of the Income tax Act to enable the firm to be registered

Letters exchanged may constitute an instrument of partnership Where the correspondence is silent or incomplete about certain matters, it is necessary, to enquire into the subsequent acts of the parties in order to ascertain the nature of the original agreement In a case in which the Commissioner of Income tax refused to accept certain letters as an instrument of partnership because the reply of the senior partner did not cover all the points raised by the junior partner, the Calcutta High Court suggested that an opportunity should be given either for the junior partner to waive the other conditions or for the senior partner to accept them, and that the application for registration as amended in the light of the further document accepted as if made within time, i e, on the date of the original application[6a]

Registration—Cancellation of—

Under section 23 (4) as amended by Act XXI of 1930 it is open to the Income tax Officer to cancel, after giving fourteen days' notice, the registration of a firm which fails to produce the accounts and documents called for by the Income tax Officer under section 22 (4) or the evidence relied on by the firm under section 23 (2) The primary object of registration is to tax each partner on his real income, and this cannot be ascertained if the firm defaults in producing the most important evidence for this purpose In other cases except when there is a change in the partnership between the date of registration and the assessment (about which see below) it is apparently not open to the Income tax Officer to cancel the registration even if he finds later on that the partnership is not genuine. This is because the Income tax

(6) 52 Mad 367 56 M L J 151
(6a) In re *Messrs Haridas Premji*, (Calcutta H C)

Officer cannot revise or review his own orders But there would be nothing to prevent the Commissioner acting under section 33 in such cases and ordering the registration to be cancelled

Partnership—Change in—Between registration and assessment—

If there is a change in the constitution of a partnership between the date of the registration with the Income tax Officer and the date of assessment, the question arises whether the new firm or rather the firm as newly constituted should be treated as a separate assessee and called upon to make a return of income and register itself if it seeks that privilege The answer to the question would apparently depend on whether the change in the constitution is such that it automatically dissolves the partnership or not Under section 253 of the Contract Act a partnership will be automatically dissolved in the absence of any contract to the contrary in the following circumstances

"(7) If from any cause whatsoever any member of a partnership ceases to be so, a partnership is dissolved as between all the other members (10) Partnerships whether entered into for a fixed time or not are dissolved by the death of any partner"

It would therefore depend on the terms of each partnership how far a change in the constitution dissolves a partnership If a partnership is dissolved and a new partnership takes its place, it would seem that the new firm should be treated as a separate assessee and permitted to register itself and also to furnish a return of income The mere fact that the old firm had already been asked to make a return or had in fact made a return will not attach to it, *i e*, to its partners the liability to tax, which liability arises only after assessment Nor can the return sent in by the old firm which *ex hypothesi* is a different assessee from the new firm bind the firm Also the fact that a notice had been *served on the old firm will not bind the new firm The liability of* the new partnership in respect of the profits of the old partnership would be governed by section 26

Obviously all these complications would be avoided if the Income tax Officer postponed registering the firm till he was ready to make the assessment

Cancellation of assessment when cause is shown

27 Where an assessee or, in the case of a company, the principal officer thereof, within one month from the service of a notice of demand issued as hereinafter provided, satisfies the Income-tax Officer that he was

prevented by sufficient cause from making the return required by section 22, or that he did not receive the notice issued under sub-section (4) of section 22, or sub-section (2) of section 23, or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying, with the terms of the last-mentioned notices, the Income-tax Officer shall cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of section 23

Previous law—

Under the Act of 1918, the only way in which an assessee could re open an assessment was to get the appellate authority to pass an order on appeal remanding the case This could be done—in fact an appeal lay in such cases only if the assessee did not wilfully withhold the return—*see* section 21 of that Act

It will be seen that this section is to some extent analogous to Rules 9 and 13 of Order IX of the Civil Procedure Code, the important difference being that while an *ex parte* decree may be appealed against under the Civil Procedure Code, no appeal lies against an assessment under section 23 (4)

Prevented'—Meaning of—

Though express mention has not been made in this section of cases in which the notice under section 22 (2) does not reach the assessee, the above section will evidently also apply to such cases If a literal construction were followed, it might be possible to argue that a *person could not be prevented from doing* a thing unless he had an intention to do so, and *ex hypothesi* the assessee could not have intended making a return in the absence of a notice having been served on him under section 22 (2) Therefore, in such a case the Income tax Officer has no power to re open the assessment But it is not impossible so to read the section as to permit the re opening of assessments if the assessee shows that the notice under section 22 (2) did not reach him Otherwise the assessee would be left without a remedy except that of the Commissioner's intervention under section 33 and ordering a re assessment

Appeal—

As regards the right of appeal against an order refusing to re open an assessment under this section, *see* section 30

United Kingdom Law—

In the United Kingdom there is no such provision as is contained in this section Nor is one necessary because in that country assessments against *ex parte* or estimated assessments [corresponding to those here under section 23 (4)] can be appealed against

Sufficient cause—

An assessee who failed to produce the accounts of a branch before the local Income tax Officer when he called for them, and promised to produce them before the Income tax Officer assessing the head office, failed to produce before them before the latter officer also on the ground that it was inconvenient to produce the branch accounts at the head office *Held,* that the assessee was not prevented by sufficient cause from producing the accounts before the Income tax Officer [7 11]

"The word 'prevent involves some definite active cause making compliance with the order impossible, and not a passive cause such as the opinion that compliance is not obligatory because of rights supposed to be secured under the Act "[7 11]

In *Kajorimal v Kalyanmal,*[12] the same High Court ruled that the question whether an assessee is prevented by sufficient cause from complying with the notices issued by the Income tax Officer is a mixed question of fact and law In *Ramkuar Mohanlal's case,*[13] the same High Court held on the facts of the case that the assessee was not prevented by sufficient cause

In *Siva Pratap Bhattadu* v *Commissioner of Income tax*[14] *Kumaraswami Sastri, J*, held in the first instance that it was entirely a matter for the Income tax Officer to decide whether on the particular facts of the case the assessee had shown sufficient cause and that even if the High Court considered that the Income tax Officer had judged harshly and made the assessment *ex parte* the High Court had no jurisdiction to interfere under section 66 This was appealed against On appeal *Coutts Trotter, C J*, held that the question was essentially one of fact, but *Krishnan, J* held that the discretion vested in the Income tax Officer under section 27 should be exercised judicially, that the question is one of law and that though it may be open to a High Court to order a reference under section 66, it would not do so unless the discretion was *prima facie* improperly or illegally exercised The

(7 11) *Lachhman las Baburam v Commissioner of Income tax U P* 2 I T C 3

(12) 3 I T C 451

(13) 3 I T C 375

(14) 2 I T C 40

view taken by *Krishnan, J*, was also taken by the Rangoon High Court in *P K N P K Chettiyar Firm's case*[15] The latter High Court ruled in *A K R P L A Chettiyar's case* that the only question of law that can arise in such cases is whether there was sufficient evidence to show that the assessee was prevented by sufficient cause The Court will not consider whether on the facts the inference of the departmental authorities was correct

The following rulings as to "sufficient cause" may also be noted though they do not relate to Revenue cases

Per *Kershaw, C J and Fulton, J*— The Judge had a discretion to decide on the application and it becomes necessary to enquire (1) what is the meaning and extent of such discretion, and (2) under what circumstances it can be said to be illegally exercised

In *Sharpe v Wakefield*[16] Lord Halsbury, L C observed

An extensive power is confided to the justices in their capacity as justices to be exercised judicially and discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice not according to private opinion—*Rooke's case*[17] according to law and not humour It is to be not arbitrary, vague and fanciful but legal and regular And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself—*Wilson v Rastall*[18] So in *Reg v Boteler*[19] where justices thought proper not to enforce the law because they considered that the Act in question was unjust in principle the court of Queen's Bench compelled them by a peremptory order to do the act which nevertheless the statute had said was in their discretion to do or leave undone So again in the case of overseers who were required by 3 and 4 Vict c 61 to certify whether applicants for beer licences were real residents and rate payers of the parish it was held that they were not entitled to refuse the certificate on the ground that in their opinion there were already too many public houses or that the beer shop was not required So a discretion which empowered justices to grant licences to inn keepers as in the exercise of their discretion they deemed proper would not be exercised by coming to a general resolution to refuse a licence to everybody who would not consent to take out an excise license for the sale of spirits—*Reg v Sylvester*[20]

The general result of the cases is stated by *Wills J* in *Sharpe v Wakefield*[21] as follows —

(15) 4 I T C 87
(16) (1891) A C 173 at 179
(17) 5 Rep 100 a
(18) 4 T R at p 757
(19) 33 L J M C. 101
(20) 31 L J M C 93
(21) (1888) 21 Q B Div 66 at p 80

"So far it is, I think, impossible to contend that there was * * * * * * * * * * * * any limitation upon the absolute discretion of the justices, when applied to for a new licence, to grant or refuse it upon any grounds which to them seem fit grounds to act upon, provided that there is a real judgment exercised in respect of the individual case I mean to exclude, for instance, a case in which the ground of refusal had absolutely nothing to do with the question in hand, as for instance where the justices refused the licence because the applicant had not taken out a spirit licence—*Reg* v. *Sylvester*[22] or where they had laid down a general rule that they would grant no more licences in the locality—*Reg* v *Justices of Walsall*[23] In such cases, there is really no exercise of discretion at all, and it is very much as if the licence had been refused because the applicant wore a blue coat or a white hat But where it cannot be shown that no real discretion had been exercised, the applicant has, in case of refusal, no other resort and must submit to his fate"

Applying this principle we have to consider whether in the present case we are satisfied that the Judge has exercised no real discretion If he had evidence before him, which would fairly warrant a reasonable man in his position coming to the conclusion at which he arrived, it cannot be contended that he exercised no real discretion In such a case, there would be no question of law involved but he would be deciding a question of fact on reasonable and proper grounds which would not entitle this Court to interfere It has even been decided in such a case that the mere fact that the Court above would have come to a different conclusion is no ground for interference—*Ranchodji* v *Lallu*[24] and *Fatima Begam* v *Hans*[25] "[26]

Per *Sir Arnold White C J*—The test is,—Has the discretion been exercised after appreciation and consideration of all the facts which are material for the purpose of enabling the Judge to exercise a judicial discretion and after the application of the right principle to those facts? If a discretion is exercised under these conditions and a certain conclusion is arrived at, that conclusion is an exercise of discretion judicially sound though an appellate tribunal might be disposed to draw a different inference from the facts [27]

Per *Schwabe, C J*—" When for some reason a man has not attended a case in Court and there is no sufficient explanation of his absence, the case, by reason of his absence, is allowed to go *ex parte* If he comes to Court afterwards and asks that his case may be restored to file, the question to be considered by the Court is not whether by some human possibility, being wise after the event, he could not have got there in time or whether a man who studied his railway guide a little better, would not have got in another train or taken another route, but whether

(22) 2 B & S 322
(23) 3 C L R 100
(24) (1882) 6 Bom 304
(25) (1887) 9 All. 244
(26) *Parvati* v *Ganpati* I L R 23 Bom 516, 517
(27) *Kichilappa Naicker* v *Ramanujam Pillai*, I L R 25 Mad 167.

a man honestly intended to be in Court and did his best though in his own stupid way, to get there in time, and once the Court is satisfied, as was the fact in this case, that the man did try to get there and that he would have got there in time but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court, in my judgment, to set aside the judgment, mulcting, in proper cases, the delinquent man in costs. In all those cases, this universal panacea for healing wounds, as it has been called in England, will properly be applied It is not right in cases of this kind that the man should have his case disposed of without being heard These Courts are here so that people who have cases can have those cases heard and determined, and it should never be the intention of the Court that a man should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot b put right, as far as the other side is concerned, by making the man to blame pay for it . "[28]

It will be observed that Courts have generally regarded the question of sufficient cause differently from the question of sufficient evidence *See also* the Rangoon High Court's judgment in *P K N. P. R Chettiyar Firm's case*[29]

Penalty for concealment of income or improper distribution of profits

28 (1) If the Income-tax Officer, the Assistant Commissioner or the Commissioner in the course of any proceedings under this Act, is satisfied that an assessee has concealed the particulars of his income, or has deliberately furnished inaccurate particulars of such income, and has thereby returned it below its real amount, he may direct that the assessee shall, in addition to the income-tax payable by him, pay by way of penalty a sum not exceeding the amount of income-tax which would have been avoided if the income so returned by the assessee had been accepted as the correct income.

(2) If the Income-tax Officer, the Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act, is satisfied that the profits of a registered firm have been distributed otherwise than in accordance with the shares of the partners as shown in the instrument of partnership registered under this Act

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(28) *Arunachela Ayyar v Subbaramiah,* I L R 46 Mad 62, 63

(29) 4 I T. C 87.

governing such distribution, and that any partner has thereby returned his income below its real amount, he may direct that such partner shall, in addition to the income-tax payable by him, pay by way of penalty a sum not exceeding the amount of income-tax which has been avoided, or would have been avoided if the income returned by such partner had been accepted as his correct income, and no refund or other adjustment shall be claimable by any other partner by reason of such direction

(3) No order shall be made under sub-section (1) or sub-section (2) unless the assessee or partner, as the case may be, has been heard, or has been given a reasonable opportunity of being heard.

(4) No prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penalty has been imposed under this section.

(5) An Assistant Commissioner or a Commissioner who has made an order under sub-section (1) or sub-section (2) shall forthwith send a copy of the same to the Income-tax Officer

History—

See section 24 and section 39 (*a*) of the 1918 Act Under that Act, penal assessment could be made only "in making any assessment or adjustment", now, it can be made "in the cours of any proceedings under this Act" The latter would include, for example, cases of refunds under sections 48 and 49 as well as revisional proceedings under section 33, while the former would not

Sub-section (2) was introduced, and consequential alterations made in the other parts of the section by Act XXI of 1930

United Kingdom Law—

See section 132 of the Act of 1918 Treble the proper tax is levied as a matter of course instead of the maximum of double in India There is also a provision in the United Kingdom for punishing persons abetting the submission of false returns.

Concealment—Question of fact—

It is clear that it must be a question of fact whether there has been concealment or deliberate misrepresentation Relevant considerations would be the magnitude of the omitted income, the method of accounting, and the nature of the transactions omitted So long as there is evidence to support the finding of the Revenue Officers, no question of law can ordinarily arise

For the purpose of imposing the penalty, the true figure of profit is not that estimated by the assessee or shown in his books but that determined by the Income tax Officer if the books are not reliable It is also not necessary for the Income tax Officer to specify each item in detail, or the method of computation or estimate involved in the concealment [29a]

'In the course of any proceedings"—

It is not necessary that the discovery by the Income tax Officer or Assistant Commissioner should be made before the assessment or decision on the appeal The change in the wording as compared with the 1918 Act should be observed It is also not necessary that the concealment should relate to the proceedings in the course of which it comes to light

'Deliberately"—

Accidental mistakes cannot be penalised, *see also* section 22 (3)

Appeal—Right of—

As regards appeal against a penalty imposed under this section by the Income tax Officer, *see* section 30, and as regards appeal against a penalty imposed by the Assistant Commissioner on appeal, *see* section 32 There is no right of appeal against a penalty levied in the course of revisional proceedings by the Commissioner, nor a right of reference to the High Court [30]

Improper distribution of profits—

The object of sub section (2) is to check evasion of tax, which is possible, by the dominant partner understating his true share in the course of getting the firm registered and thus reducing the tax payable The words "governing such distribution" must be read with reference to section 26

"Reasonable opportunity"—

Whether reasonable opportunity was given or not is a question of fact [29a] Sometimes, the Income tax Officer may pre

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(29 a) *Abani Kanta Saha v Commissioner of Income tax, Bihar and Orissa* (unreported)

(30) *Jangi Bhagat Ramavatar v Commissioner of Income tax, Bihar and Orissa*, 3 I T C 418.

sume that the assessee had 'constructive notice' As to what this is, it is—

> 'the knowledge which the Courts impute to a person (upon a presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted) either from his knowing something which ought to have put him to further enquiry or from his wilfully abstaining from enquiry to avoid notice [31]

There is no form prescribed for giving notice to the assessee under this section before he is penalised *'Forthwith'* does not mean *at once*, without the lapse of any interval, but as soon as possible thereafter [32]

Revised return—Effect of putting in—

The fact that the assessee has put in a revised return will not absolve him from the penalty under this section if in the original return he had "deliberately furnished inaccurate particulars" of income etc He can put in a valid revised return only if he "discovers any omission or wrong statement" in the original return [section 22 (3)] A man cannot 'discover' something that he did deliberately, and section 22 (3) will not apply to such a case

Prosecution—

The second proviso does not bar a prosecution with reference to other facts All that it does is to bar a prosecution for concealment of income, *i e*, for putting in a false return [33]

Penalty when proceedings are illegal—

Assessee whose income had escaped assessment was served by the Income tax Officer with notice under section 34 There was no response to the notice, and the Income tax Officer assessed him under section 23 (4) An application made under section 27 was rejected, and on appeal against this rejection the Assistant Commissioner held that there had been no valid service of notice The Commissioner of Income tax did not set aside the Assistant Commissioner's order but proceeded to re assess under section 34 *Held*, that the proceedings under sections 33 and 34 were null and void, and that the Income tax Officer could not levy penalty under section 28 since there were no proceedings under the Act [33a]

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(31) Per *Farwell J* in *Hunt v Luck* (1901) 1 Ch ? (Stroud)

(32) *R v Berkshire Justices* 4 Q B D 469

(33) See *R v Hussain Ally* 1 I T C 48

(33-a) *Sheik Abdul Kadir Marakayar & Co v Commissioner of Income tax*, 2 I T C 372

Assessment on dead persons—

In view of the following considerations, *viz* :—

(*a*) the definition of "assessee" in section 2 (2) which clearly applies only to living persons,

(*b*) the reference to "the total income of the assessee" in sub sections (1) and (3) of section 23, and the reference to "the" assessment and not "an" assessment in sub section (4) of section 23 [thereby referring to sub sections (1) and (3) and therefore to the total income of "the assessee"];

(*c*) the inapplicability of section 27 to cases of dead persons

(*d*) the necessity for giving the same meaning to the word "assessment" in the two places in which it occurs in section 29 if a dead person can be assessed, the word "assessee" occurring first should refer to the dead person and the word occurring second should refer to the administrator or heir of the estate of the deceased,

(*e*) the complete absence of a reference to a deceased person throughout the act, it was *held* by the Bombay High Court in the case of the estate of the late Sir Henry Proctor that an assessment cannot be made on a dead person under section 23 (4)

With the exception of (*c*), all the arguments above apply to cases under sub sections (1) and (3) of section 23 also and it would follow therefore that no assessment can be made on dead persons at all In the case of assessments under sub sections (1) and (3) of section 23, an argument similar to (*c*) above can be founded on section 30

It was also stated in the *Darbhanga case*,[33b] that the Act does not contemplate assessment of the heirs of a deceased person on his income during his lifetime

If the assessment is made before a person dies, the tax evidently is a debt due to the Crown and the estate would therefore liable to pay But the machinery of section 46 can, presumably, not be applied because of want of notice under section 29, and the Crown must recover the tax in some other manner (by suit?)

In *Mitchell* v *Macneill & Co*,[33c] the Calcutta High Court *held* that the payment of tax by a firm on behalf of a deceased partner's estate in respect of the income of the deceased during the previous year was a voluntary payment, not covered by section 69 of the Indian Contract Act, the return of

(33b) 9 Pat 240
(33c) 2 I T C 298

income in the case having been filed by the administrator after the death of the partner.

See also *Govinda Saran* v. *Commissioner of Income-tax, United Provinces*,[33d] in which the Lucknow Chief Court said *obiter* that "assessee" might include the representative of the estate of a deceased person.

Jurisdiction of appellate authority to impose penalty—

See *Pitta Ramaswamiah* v. *Commissioner of Income-tax*[34] set out under section 23.

Notice of demand.

29. When the Income-tax Officer has determined a sum to be payable by an assessee under section 23, or when an order has been passed under sub-section (2) of section 25 or section 28 for the payment of a penalty, the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable.

Rule 20.—The Notice of Demand under section 29 shall be in the following form:—

NOTICE OF DEMAND UNDER SECTION 29 OF THE INCOME-TAX ACT, 1922.

To

____

____

____

1. You have been assessed for the year to income-tax amounting to Rs. [in addition to which a penalty of Rs. has been imposed], as shown in the copy of the assessment form sent herewith.

2. You have also been assessed to super-tax amounting to Rs.

3. You are required to pay the amount of Rs. on or before the———to at when you will be granted a receipt.

4. If you do not pay the tax on or before the date specified above, you will be liable to a penalty which may be as great as the tax due from you.

5. If you are dissatisfied with your assessment you may present an appeal under sub-section (1) of section 30 of the Indian Income-tax Act, 1922, to the Assistant Commissioner of

(33d) 2 I. T. C. 45.
(34) 2 I. T C. 196.

Income tax at within 30 days from the receipt of this notice, on a petition duly stamped in the form prescribed under sub section (3) of section 30 and verified as laid down in that form

Or

The assessment has been made under sub section (4) of section 23 of the Indian Income tax Act, 1922, because you failed

... under sub section (2) of section 23 and no appeal lies But if you were prevented by sufficient cause from making the return or did not receive the notice(s) aforesaid, or had not a reasonable opportunity to comply, or were prevented by sufficient cause from complying, with the terms of the notice(s), you may apply to me, within one month from the receipt of this notice, under section 27, to cancel the assessment and proceed to make a fresh assessment

6 The appropriate chalan should be sent along with the amount paid Should you lose the chalans attached to this notice of demand, it will be necessary for you to apply to the Income tax Officer for copies of fresh chalans

Dated——————19

Income tax Officer

(*Place*)——————

Note—The superfluous words in paragraph 5 should be deleted

ASSESSMENT FORM

ASSESSMENT FOR 193 3 UNDER SECTION .

District or Area *Act XI of 1922*

Name of assessee Number in General Index

Address Number of Miscellaneous Record

Serial number	Detailed sources of income	Amount of income	Tax deducted at source		Remarks
		RS	RS	A	
1	Salary (including employee's provident fund contributions).				
1 A	Annual accretion (*less* employee's provident fund contributions) under Section 58-A (*f*)				
2	Interest on securities				
3	Property				
4	Business				
5	Profession				
6	Other sources				

	Rs	A	Rs	A
(i) Total income . ..				
(ii) Deduction under section 7 (1) on account of provident funds to which the Provident Funds Act 1897, applies				
(iii) Deduction on account of recognized provident fund— (a) Contributions (b) Exempted interest				
(iv) Deduction on account of insurance premia				
(v) Deduct sums received as dividends or from a firm the profits of which have been charged to tax				
(vi) Deduct amount of interest from tax free securities of the Government of India or of a Local Government				
(vii) Income now to be taxed				
(viii) Rates applicable—pies per rupee				
(ix) Amount of tax				
	Rs	A		
(x) Deduction under section 17				
(xi) Amount of deductions at source from salary or interest on securities for which credit is given under section 18 (5)				
(xii) Abatement on account of dividends (at pies per rupee)				
(xiii) Abatement on account of income from a registered firm (at pies per rupee)				
(xiv) Net amount of tax (or refund) (xv) *Penalty* under section *28* [or section 25 *(2)*] (xvi) Total sum payable (or to be refunded (in figures as well as in words) Rupees Annas				

Dated——————193

Income tax Officer.

* * * * * *

Notice of demand—

The notice of demand—referred to in section 29 and prescribed in rule 20 draws a clear distinction between the cases where an appeal lies against an assessment and where an appeal does not lie, and shows the appropriate remedy to an aggrieved assessee in either case. These

Income tax at within 30 days from the receipt of this notice, on a petition duly stamped in the form prescribed under sub section (3) of section 30 and verified as laid down in that form

Or

The assessment has been made under sub section (4) of section 23 of the Indian Income tax Act, 1922, because you failed
to make a return of your income under section 22
to comply with a notice under sub section (4) of section 22 and no appeal lies But
to comply with a notice under sub section (2) of section 23
if you were prevented by sufficient cause from making the return or did not receive the notice(s) aforesaid, or had not a reasonable opportunity to comply, or were prevented by sufficient cause from complying, with the terms of the notice(s), you may apply to me, within one month from the receipt of this notice, under section 27, to cancel the assessment and proceed to make a fresh assessment

6 The appropriate chalan should be sent along with the amount paid Should you lose the chalans attached to this notice of demand, it will be necessary for you to apply to the Income tax Officer for copies of fresh chalans

Dated————————19

Income tax Officer

(Place)————————

Note—The superfluous words in paragraph 5 should be deleted

ASSESSMENT FORM

ASSESSMENT FOR 193 3 UNDER SECTION .

District or Area *Act XI of 1922*

Name of assessee Number in General Index

Address Number of Miscellaneous Record

Serial number	Detailed sources of income	Amount of income	Tax deducted at source		Remarks.
		RS	RS	A	
1	Salary (including employee's provident fund contributions)				
1 A	Annual accretion (*less* employee's provident fund contributions) under Section 58 A (f)				
2	Interest on securities				
3	Property				
4	Business				
5	Profession				
6	Other sources				

Therefore, if a mistake has been made in writing out the notice, a corrected notice can be issued The fact that, by inadvertence, the sub section of section 23 under which the assessment was made is wrongly entered in the notice will neither deprive the assessee of the right of appeal if the assessment was made under section 23 (3) nor give him such a right if the assessment was made under section 23 (4) [38]

Similarly the issue of a demand notice wrongly headed "section 29" in respect of an order by the Commissioner under section 33 gives the assessee no right of appeal or of a reference to the High Court [39]

30 (1) Any assessee objecting to the amount or rate at which he is assessed under section 23 or section 27, or denying his liability to be assessed under this Act, or objecting to a refusal of an Income-tax Officer to make a fresh assessment under section 27, or to any order against him under sub-section (2) of section 25 or section 25-A or section 28, made by an Income-tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order

Appeal against assessment under this Act

Provided that no appeal shall lie in respect of an assessment made under sub-section (4) of section 23, or under that sub-section read with section 27

(2) The appeal shall ordinarily be presented within thirty days of receipt of the notice of demand relating to the assessment or penalty objected to, or of the date of the refusal to make a fresh assessment under section 27, as the case may be, but the Assistant Commissioner may admit an appeal after the expiration of the period if he is satisfied that the appellant had sufficient cause for not presenting it within that period

(3) The appeal shall be in the prescribed form and shall be verified in the prescribed manner

(38) In re *Pratap Chandra Ganguly (Calcutta)* (unreported)

(39) *Mohamad Fazl Mohamad Shafi v Commissioner of Income tax Punjab* 3 I T C 6[?]

Rule 21—An appeal under section 30 shall, in the case of an appeal against a refusal of an Income tax Officer to make a fresh assessment under section 27, be in Form A, in the case of an appeal against an order of an Income tax Officer under section 25 (2), in Form C in the case of an appeal against an order of an Income tax Officer under section 28, in Form D, and in other cases, in Form B

FORM A

Form of appeal against an order refusing to re open an assessment under Section 27

To

The Assistant Commissioner of

The day of 19

The petition of of

sheweth as follows —

1 Under the Indian Income tax Act, 1922, your petitioner has been assessed on the sum of Rs for the year commencing the 1st day of April 19

2 Your petitioner was prevented by sufficient cause from making the return required by section 22 or did not receive the notice issued under sub section (4) of section 22 or sub section (2) of section 23, or had not a reasonable opportunity to comply or was prevented by sufficient cause from complying with the terms of the notice under sub section (4) of section 22 or sub section (2) of section 23, as more particularly specified in the statement attached

3 Your petitioner therefore presented a petition to the Income tax Officer under section 27, requesting him to cancel the assessment This petition the Income tax Officer by his order dated of which a copy is attached, has rejected

4 Your petitioner therefore requests that the order of the Income tax Officer may be set aside and that he may be directed to make a fresh assessment in accordance with the law

(Signed)————

STATEMENT OF FACTS

Form of verification

I, , the petitioner, named in the above petition, do declare that what is stated therein and in the above statement of facts is true to the best of my information and belief

(Signed)————

FORM B.

Form of appeal against assessment to Income tax.

To

The Assistant Commissioner of

The day of 19

The petition of of

sheweth as follows —

1 Under the Indian Income tax Act, 1922, your petitioner has been assessed on the sum of Rs for the year commencing the 1st day of April 19 The notice of demand attached hereto was served upon him on

2 Your petitioner's income accruing or arising or received or deemed under the provisions of the Act to accrue or arise or to be received in British India for the year ending the day of 19 amounted to Rs

3 Such income and profits actually accrued or arose or were received during the period of months and days

4 During the said year your petitioner had no other income or profits

5 Your petitioner has made a return of his income to the Income tax Officer under section 22, sub section (2) of the Act and has complied with all the terms of the notice served on him by the Income tax Officer under section 23 (2) and or [section 22 (4)]

Your petitioner therefore prays that he may be assessed accordingly (or that he may be declared not to be chargeable under the Act)

(Signed)————

GROUNDS OF APPEAL

Form of verification

I, , the petitioner, named in the above petition, do declare that what is stated therein is true to the best of my information and belief

(Signed)————

FORM C

Form of appeal against an order under Section 25 (2).

To

The Assistant Commissioner of Income-tax

The day of

The petition of of
sheweth as follows:—

1. Under section 25 (2) of the Indian Income-tax Act, 1922, a penalty of Rs. has been imposed on your petitioner. The notice of demand attached hereto was served upon him on .

2. Your petitioner was prevented by sufficient cause as more particularly explained below from giving notice within the time prescribed by section 25 (2) to the Income-tax Officer of the discontinuance of his business, profession or vocation.

3. Your petitioner therefore requests that the order of the Income-tax Officer imposing a penalty of Rs. upon your petitioner may be set aside.

(Signed)————

STATEMENT OF FACTS.

Form of verification.

I, , the petitioner, named in the above petition, do declare that what is stated therein and in the above statement of facts is true to the best of my information and belief.

(Signed)————

FORM D.

Form of appeal against an order under Section 28.

To

The Commissioner of Income tax / The Assistant Commissioner of Income tax

The day of 19 .

The petition of of
sheweth as follows:—

1. Under section 28 of the Indian Income-tax Act, 1922, a penalty of Rs. has been imposed on your petitioner by the Assistant Commissioner / Income-tax Officer . The notice of demand attached hereto was served upon him on .

2. Your petitioner did not conceal the particulars of his income or deliberately furnish inaccurate particulars thereof but as will be seen from the statement of facts attached returned it at its real amount to the best of his knowledge and belief.

3. Your petitioner therefore requests that the order of the Assistant Commissioner / Income tax Officer imposing a penalty of Rs. upon your petitioner may be set aside.

(Signed)————

STATEMENT OF FACTS

Form of verification

I, , the petitioner, named in the above petition, do declare that what is stated therein is true to the best of my information and belief

(Signed)——————

History—

This section roughly corresponds to section 21 of the 1918 Act and section 25 of the 1886 Act, but is completely different in detail, the machinery of administration having been radically changed The words "or section 25 A" were inserted by Act XXII of 1930, *ex majori cautela* to make it clear that an order under section 25 A is appealable

Appeals to Assistant Commissioner—

It is necessary that every effort should be made to get tax payers to file returns of income and the restrictions on appeals contained in the proviso to section 30 (1) which definitely forbid the entertainment of any appeal against an assessment where the Income tax Officer has been compelled to make the assessment under section 23 (4) (*i e* in cases where an assessee has failed to make a return or has failed to produce his accounts when called for or has failed to produce any proof of the accuracy of his returns) should be rigidly adhered to Under no circumstances may any appeal be entertained in those cases

The form in which an appeal must be presented to the Assistant Commissioner is specified in rule 21 and that form must also be verified in the method prescribed in the same rule Any false statement in the said verification is punishable under section 52 (*Income tax Manual,* para 78)

Defective appeals—

The Assistant Commissioner is not bound to call upon the appellant to rectify defects in an appeal and may reject *in limine* a defective appeal, *e g*, unsigned and unverified [40]

Limitation—Relaxation of—Computation of—

The use of the word 'ordinarily' shows that the Assistant Commissioner can, if he is satisfied, extend the period of thirty days, *if the Assistant Commissioner refuses so to extend the* period, there is no question of law involved, and no reference to the High Court can lie [41] As regards computing the period of limitation, *see* section 67 A

Appeal admissible only in cases specified—

There is no inherent right of a subject to appeal against an order (*see* Rules of construction—Introduction) In cases

(40) *Damodar Prasad v Commissioner of Income tax Bihar and Orissa* 3 I T C 405

(41) *Kam Chettiyar v Commissioner of Income-tax* 2 I. T C 99

not specified in this section, *e g*, refusing a refund under section 48 or 49, there is no right of appeal[42]

Per *Swinfen Eady, L J*—"The Rule of Law is that although a *certiorari* lies unless expressly taken away, yet an appeal does not lie unless expressly given by statute"

Assessee denying liability—

As stated above, there is no inherent right of appeal, which must be given by a statute or some authority equivalent to a statute Section 30 (1) is clear It punishes a person who does not comply with the requisition of an Income tax Officer by depriving him of the right of appeal But the appellate authority must, before denying him the right of appeal, satisfy itself that the Income tax Officer acted legally under section 23 (4) The mere fact that the assessment purports to have been made under the sub section does not shut out the appeal, it must be shown that the circumstances of the case bring it within the scope of that sub section But if the assessment is made not ostensibly but genuinely under that sub section, the Assistant Commissioner must stay his hands irrespective of whether the Income tax Officer's order is impeached on the ground that the assessee was not amenable to the provisions of the statute or any other ground mentioned in the sub section The language of the sub section makes it clear that the denial of liability to be assessed under the Act may not be put forward as a ground of attack against the assessment, that ground being open only to a person who has not incurred the penalty prescribed by the proviso The proviso makes no distinction between an assessment which is *ultra vires* of the Act and which though *intra vires* is wrong on the merits *Held* accordingly in a case in which a non resident assessee denied receipt of income in British India and declined to produce accounts called for under section 22 (4) and the Income tax Officer assessed under section 23 (4), that there was no right of appeal against the assessment[43]

Review—Assistant Commissioner—Cannot—

An Assistant Commissioner cannot review his own orders or those of an Income tax Officer If an Assistant Commissioner throws out an appeal because of the non appearance of the assessee, he cannot revive the appeal, even if he is satisfied that non appearance was due to "sufficient cause" The only remedy in such cases is for the assessee to move the Commissioner under section 33

(42) See *Furtado v City of London Brewery* 6 Tax Cases 382.
(43) *Bhagat Dani Chand v. Commissioner of Income tax*, 4 I. T C 33

Appeal in cases not assessed—

It is conceivable that a person who is not assessed to income tax may still have a complaint against the orders of the Income tax Officer Thus the deductions made under section 10 in respect of depreciation may be wrong, so that the assessee would be prejudiced in later years In such a case the assessee has no right of appeal, and his only remedies are either to move the Commissioner under section 33 or to wait till he is next assessed to tax and then raise the question

Proviso—Assessments not legally passed under section 23 (4)—

The proviso cannot be so construed as to prevent the High Court from examining the legality of assessments purporting to be made under section 23 (4) A reference to the High Court will therefore lie in such cases [44]

Proviso to sub section (1)—

A refusal to re open an assessment is not an assessment The proviso applies only to assessments made under section 23 (4) including those made under that section after re opening the assessment under section 27 The proviso therefore does bar an appeal against an order refusing to re open the assessment, for which on the other hand the substantive part of the section definitely provides [45]

Denial of accounts or documents—

If the Income tax Officer disbelieves the assessee s denial of the existence of accounts or documents called for under section 22 (4) and makes an assessment under section 23 (4) as a consequence the remedy of the assessee is to move the Income tax Officer under section 27 first and then appeal against his refusal to re open the assessment It is not open to the assessee to appeal straightaway on the merits of the assessment [46]

Procedure—

No rules have been laid down for the procedure to be followed by Assistant Commissioners (and Commissioners under section 32) in hearing appeals except what has been laid down in sections 31 and 32

In England the procedure is as below Both before the General Commissioners and the Special Commissioners the Sur-

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(44) *Commiss oner of Income tax v I E A N Chettyar and V D M E M Chettyar* 6 Rang 21 *S P K A A M Chett yar F rm v Commiss oner of Income tax Burma*

(45) *A K 1 C T V V Chett yar F rm v Comm ss oner of Income tax Burma* 3 I T C ^53

(46) *M K S Chett yar Firm v Comm ssioner of Income tax Burma* 8 R. ӡS"

veyor of Taxes represents the Crown, and the assessee also is represented. The Surveyor of Taxes may not be present after the arguments when the Commissioners deliberate.[47]

There is nothing in the law in India to prevent the Assistant Commissioner conferring with the Income-tax Officer if he so desires.

Assessment by estimate—

In England, assessments by estimate in the absence of returns [corresponding to assessments under section 23 (4) here] can be appealed against.[48]

Hearing of appeal

31. (1) The Assistant Commissioner shall fix a day and place for the hearing of the appeal, and may from time to time adjourn the hearing.

(2) The Assistant Commissioner may, before disposing of any appeal, make such further inquiry as he thinks fit or cause further inquiry to be made by the Income-tax Officer.

(3) In disposing of an appeal, the Assistant Commissioner may, in the case of an order of assessment,—

(*a*) confirm, reduce, enhance or annul the assessment, or

(*b*) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit or the Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment,

or, in the cases of an order under sub-section (2) of section 25 or section 28,

or, in the case of an order refusing to make a fresh assessment under section 27,

(*c*) confirm such order, or cancel it and direct the Income-tax Officer to make a fresh assessment ;

(47) *R. v. Brixton Income-tax Commissioners (Ex parte Lion Brewery Co., Ltd.)*, 6 Tax Cases 195.

(48) *Holborn Viaduct Co. v. Queen*, 2 Tax Cases 228.

(*d*) confirm, cancel or vary such order

Provided that the Assistant Commissioner shall not enhance an assessment unless the appellant has had a reasonable opportunity of showing cause against such enhancement

Powers of Assistant Commissioner in dealing with appeals—

The Assistant Commissioner is not required to pass orders on the actual date of hearing, but may pass orders after the last day of hearing

Appeals should never be simply *dismissed* for default of appearance—they should always be decided *on their merits*, and a reasoned decision written whether the appellant appears or not If the notice of hearing has not been served on the appellant in time to permit of his appearing in person or by pleader at the time and place fixed for the hearing of appeal, the appeal should not be disposed of, but should be adjourned and a fresh notice issued to the appellant (*Income tax Manual*, para 79)

History—

See section 22 of the 1918 Act The provisions for remanding for further enquiry and for giving opportunity to the assessee before enhancement are new The portion in sub section (3) relating to appeals against orders passed under section 27 was inserted by Act XXII of 1930 It is primarily a drafting amendment and makes it clear that the Assistant Commissioner shall not go into the merits of the assessment in such cases

United Kingdom Law—

As will be seen from the notes under section 5, the administrative machinery in the United Kingdom is so cumbrous and so dissimilar to that here, that the details of procedure in the United Kingdom regarding appeals are not of much interest

Letting in fresh evidence—

An appellant in income tax proceedings has no higher right in adducing fresh evidence on appeal than he would have in a civil case under Order 41, Rule 27 of the Civil Procedure Code It is entirely within the discretion of the appellate authority to admit or reject further evidence, and where the assessee has had opportunity to tender evidence before the lower authority, the appellate authority need not allow any further evidence [49] Section 37 gives the Assistant Commissioner powers to call for evi-

(49) L V *Chettyar Firm v Commissioner of Income tax, Burma*, 4 I T C 111

dence, etc. It is the Assistant Commissioner's duty to decide both on questions of law and questions of fact. The fact that a reference can be demanded to the High Court on questions of law does not absolve him from the obligation to decide questions of law.

Costs—

No costs will be allowed to an assessee who succeeds in his appeal before the Assistant Commissioner.

Who may represent assessee—

The assessee may be represented by any authorised person—*see* section 61. In the United Kingdom, only Barristers, Solicitors and Accountants may represent the assessee unless he appears in person.

Appeals against orders passed under section 27—

In deciding such appeals, the jurisdiction of the Assistant Commissioner is limited to seeing whether the appellant had sufficient cause preventing him from complying with the requirements in respect of which the default occurred. He is not at liberty to enter into the merits of the assessment.[50]

Whether the Income-tax Officer applied his discretion justly in refusing to re-open an assessment under section 27 may be a question of law arising out of an appellate order passed under section 31. *See* however notes under section 27.

Assistant Commissioner not bound by the letter of the Indian Evidence Act—

In this respect, the position of the Assistant Commissioner is the same as that of the Income-tax Officer. *See* notes under section 23 as to how far the Income-tax Officer is bound by the Law of Evidence, and the cases cited under that section.

Per *Scrutton, L. J.*, in *Belfour* v. *Mace*[1]: "When an assessment is made by Commissioners the burden is upon the person disputing it to displace it, not on the person making it to sustain it."

Preliminary state of facts to be decided by Assistant Commissioner—

It is for the Assistant Commissioner to decide first of all whether an appeal lies or not. *See* the notes under section 23 as to the difference between orders passed under section 23 (3) and those under section 23 (4). *See also* notes under section 30. He should similarly decide as regards questions of jurisdiction—*see* section 64.[2]

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(50) *Jhuri Misra* v. *Commissioner of Income tax, U. P.*, 3. I. T. C. 248; In re *Pratap Chandra Ganguly (Calcutta High Court)*; *Mohanlal Hurdeodas* v. *Commissioner of Income tax, Bihar and Orissa*, 9 Pat. 172.

(1) 138 L. T. 338: 13 Tax Cases 539.

(2) See also *R.* v. *Bloomsbury Commissioners*, 7 Tax Cases 59.

The fact that the Assistant Commissioner 'entertained' an appeal gives him no power to consider questions not within his jurisdiction, *e g*, the merits of an assessment made under section 23 (4) It is unnecessary for him to say that the appeal is incompetent, if he simply dismisses it, there is nothing wrong in his orders[3] The Assistant Commissioner however must, in disposing of an appeal, state the facts and give reasons for his conclusions[4]

Appeal against orders under section 31—

No appeal lies against the appellate orders of the Assistant Commissioner unless there is an enhancement of assessment under this section or a penalty is levied by the Assistant Commissioner under section 28 Otherwise, the only remedies are a petition to the Commissioner under section 33, or a reference to the High Court under section 66 if a question of law is involved

Appeals against assessments made under section 34—

See notes under section 34

Non appearance of assessee—

An Assistant Commissioner cannot dismiss an appeal because the assessee does not appear Whether he appears or not, the Assistant Commissioner should consider the appeal on its merits and decide There is no provision in the law authorising the Assistant Commissioner to dismiss an appeal *i e*, without applying his mind to it, simply because the appellant does not appear But the appeal should of course be otherwise in order before he can consider it

Adjournment—

Though there is no provision to that effect, it is obviously the duty of the Assistant Commissioner to re open the hearing if *it is apparent that the notice of hearing has not reached the* assessee If the Assistant Commissioner has decided an appeal *ex parte* he cannot re open the appeal on grounds similar to those set out in section 27, even if the appellant shows that he was prevented by sufficient cause from being present at the hearing of the appeal

Assistant Commissioner cannot travel beyond subject of appeal—

This section—

' is enacted for the benefit of the subject and also to the limited extent therein stated for the benefit of the Crown But the subject

(3) *Nawal Kishore Kharaiti Lal v Commissioner of Income tax Delhi* A I R 1930 Lah 1014

(4) *Ramprata p Sukh Dial v Commissioner of Income tax Delhi* 3 I T C 362.

matter of the appeal is the assessment and the scope of the appeal must in my opinion be limited by the subject matter The appellate authority has no power to travel beyond the subject matter of the assessment and for all the reasons advanced by the appellant [(1) Sec 34 expressly provides for assessment of escaped' income and that provision should be followed (2) The assessee is deprived of the right of appeal in respect of the new items (3) Assessment means assessment under section 23—which presupposes a return etc and items in respect of which no return was submitted could not be treated as assessed under section 23] is in my opinion not entitled to assess new sources of income To do so would not in reality be enhancing the assessment but adding a new assessment to the old [5]

Opportunity to assessee to show cause against enhancement—

The enhancement may be made by estimate if the materials before the Assistant Commissioner are insufficient to base a precise figure upon If the enhancement by the Assistant Commissioner is based on materials from which he could reasonably conclude—though only roughly—that a particular figure is the true income, then his action is legal, if, on the other hand, it is wholly arbitrary and based on no materials it is illegal

It is not necessary for the Assistant Commissioner to give notice that he proposes to enhance the assessment to a particular figure or to disclose the materials forming the basis of the proposed enhancement a general intimation of proposed enhancement is enough but he should give the basis of the enhancement in his appellate order so that the Commissioner can decide on further appeal whether the enhancement was justified [6]

Appeals against orders of Assistant Commissioner

32 (1) Any assessee objecting to an order passed by an Assistant Commissioner under section 28 or to an order enhancing his assessment under sub-section (3) of section 31 may appeal to the Commissioner within thirty days of the making of such order

(2) The appeal shall be in the prescribed form and shall be verified in the prescribed manner

(3) In disposing of the appeal, the Commissioner may, after giving the appellant an opportunity of being heard pass such orders thereon as he thinks fit

(5) *Per Ross J in Babu Jagarnath Thean v Commissioner of Income tax Bihar and Orissa* 2 I T C 4

(6) *E M Chettiyar v Commissioner of Income tax Burma* 4 I T C 111

Rule 22.—An appeal under section 32 (2) shall in the case of an appeal against an order of the Assistant Commissioner under section 28 be in Form C attached to Rule 21 and in other cases in Form E:—

Form E.

To

The Commissioner of Income-tax,

——————

The————day of————19 .

The petition of————sheweth as follows:

1. Under section 31 (3) of the Indian Income-tax Act, 1922, the Assistant Commissioner of————has increased the tax payable by your petitioner from Rs.———— to Rs.————

2. Your petitioner prays that the enhancement may be set aside or reduced to Rs.————for the reasons stated below:

(Signed)————

GROUNDS OF APPEAL.

Form of verification.

I,————, the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

(Signed)————

See Rule 21 set out under section 30.

Appeal to Commissioner—

No second appeal lies from orders passed by an Income-tax Officer. One appeal is allowed to the Assistant Commissioner under section 31. The only cases in which an appeal may be made to the Commissioner are against special orders passed by an Assistant Commissioner himself, *viz*, an order imposing a penalty under section 28 or an order enhancing an assessment in the course of an appeal. No appeal lies to the Commissioner in any other case. (*Income-tax Manual*, para. 80.)

History—

This section was introduced in 1922.

Remedies—

The only remedy open to a person aggrieved by the orders passed by the Commissioner under this section is to claim a reference to the High Court if there is a point of law. The Commissioner has no powers to revise these orders—*see* section 33

in which reference is made only to orders passed by subordinate authorities and orders passed by himself as Assistant Commissioner

Limitation—Computation of—Relaxation of—

As regards the computation of the period of limitation, *see* section 67 A The Commissioner cannot relax the period of limitation, contrast section 30 which gives discretion to the Assistant Commissioner

33 (1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any authority subordinate to him or by himself when exercising the powers of an Assistant Commissioner under sub-section (4) of section 5.

Power of review

(2) On receipt of the record the Commissioner may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such orders thereon as he thinks fit

Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard.

Power of revision—

Sections 34 35 and 50 definitely restrict the period within which subordinate authorities may themselves re open cases. The Commissioner *acting under section 33 cannot extend* this period of limitation though he can revise after it has expired action validly taken within it

The Commissioner in exercise of his power of revision need not necessarily in each case make a personal enquiry, but may cause an enquiry to be made by a subordinate officer

The power conferred by this section on a Commissioner can only be exercised once in any particular case A Commissioner who has once passed an order in connection with any case under section 33 cannot revise that order even if he subsequently finds that he has made a mistake in passing such order (*Income tax Manual*, para 81)

The 'mistake' referred to in the above instruction is a mistake not apparent from the record—*see* section 35 which expressly empowers the Commissioner to correct obvious mistake

History—

See section 23 of the 1918 Act

'Of his own motion'—

In theory, the Commissioner is expected to exercise the powers under this section *suo motu* This, however, does not prevent a person aggrieved from petitioning the Commissioner to exercise his powers under this section The Commissioner's powers are discretionary, and he cannot be compelled to use them Though there is nothing clearly provided in this section to prevent the Commissioner from exercising his powers in respect of a matter in which an appeal lies, he would not ordinarily interfere until the appeal had been disposed of, assuming, of course, that an appeal lay In any case, the Commissioner cannot, it is submitted, interfere so as to deprive a person, against his wishes, of his existing right of appeal and consequently the right of a reference to the High Court

'Proceeding'—

There is no definition of the word The expression may refer to any course of events happening under the Act, *i e*, arising out of the liability or obligation imposed by the Act 'Proceeding' is different from 'process' the latter usually refers to the doing of something in the course of a proceeding before a court and that which may be done without the help of a court is not usually called a 'process

Under this section, the Commissioner can interfere not only in respect of assessments proper but in respect of any proceeding under this Act

Review—

The power conferred by this section is really a power of revision and not of review This has been made clear by the amendments (made by Act III of 1928) in section 35 and the proviso to section 66 (2), which refer to 'revision' The marginal note against section 33 was however not altered

The validity of the view that the Commissioner can under no circumstances review his order passed under section 33 was questioned, but not decided in *Sachchidananda Sinha v Commissioner of Income tax*[7] In the absence of a decision under the Income tax Act the only guidance that can be sought is from decisions relating to the powers of Civil Courts and of other Revenue Officers Some of the authorities are given below, but it was contended in the case of *Sachchidananda Sinha* on behalf of the assessee that every court (and therefore the Commissioner of Income tax) had jurisdiction inherently to review its previous orders on being convinced of its mistake

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(7) 1 I T C 352

If there is not explicit provision in an Act for a review, a court cannot exercise that power. The power of review is not inherent in a court, and can only be exercised if it is permitted by Statute[8]

"*Prima facie* a party who has obtained a decision in entitled to keep it unassailed unless the Legislature has indicated the mode by which it can be set aside A review is practically the hearing of an appeal by the Executive Officer who decided the case There is at least as good reason for saying that such power should not be exercised unless the Statute gives it as for saying that another tribunal should not hear an appeal from the trial court unless such a power is given to it by Statute" —Per *Seshagiri Iyer, J*, in above

I cannot admit that such a power is inherent in every Judicial or Revenue officer It is a power expressly given by law to judicial officers under certain conditions, and therefore it cannot be assumed that when not so given it is inherent in every officer If this had been so there need not have been any legislation on the subject"—Per *Prinsep, J*[8a]

But a court has power to correct mistakes due to inadvertence[9] And this power has been given to the Commissioner of Income tax by the amendment of section 35 by Act III of 1928

Subject to the provisions of this Act—

The only restriction on the discretion of the Commissioner is that his orders should conform to the provisions of the Act In the corresponding provisions of the Civil Procedure Code under which the High Court may call for the record of a case decided by a court subordinate to it and revise the orders passed by the subordinate court, the restrictions imposed are that

(1) the case should be one in which no appeal lies,

(2) the subordinate court appears, (*a*) to have exercised a jurisdiction not vested in it by law, or (*b*) to have failed to exercise a jurisdiction so vested, or (*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity

In substance, these conditions are practically the same as the restrictions imposed by the words "subject to the provisions of the Act" in section 33 of the Income tax Act, except that the Income tax Act does not specifically provide for the condition

(8) *Drew v Wills* (1891) 1 Q B 450, and the Indian Cases cited in *Anantharaju Chetty v Appu Hegade*, 53 I C 56

(8a) *Lala Prayag Lal v Jainarayan Singh*, 22 Cal 419, cited in the Madras case cited above (53 I C 56)

(9) *Debi Baksh Singh v Habib Shah*, 35 All 331, *Ram Singh v Babu Kasan say* 16 Bom 116

that no appeal lies in respect of the proceedings that are revised by the Commissioner Also, the Income tax Act leaves a some what wider discretion to the Commissioner than the Civil Procedure Code leaves to the High Court

Reasonable opportunity—

In *Sachchidananda Sinha v Commissioner of Income tax*[10] it was decided that the assessee had *in the circumstances of the case* not received a reasonable opportunity of being heard before the Commissioner had passed his order The Commissioner was in effect exercising the duties of the Income tax Officer, under section 23 (2) and did not give sufficient time to the assessee to substantiate his return All that this ruling decides is that an assessee who is 'hustled' by the Commissioner does not receive 'reasonable opportunity'

Should assessee be heard?—

Though the enquiries need not be made by the Commis sioner personally, it is clear that before passing a prejudicial order the Commissioner should personally hear or give an oppor tunity for hearing to the assessee or his duly authorised repre sentative A prejudicial order is one which places the assessee in a worse position than he was in before, and clearly excludes an order in which the Commissioner declines to interfere

Limitation—

The expression "subject to the provisions of the Act" includes the restriction as to limitation imposed on other Income tax authorities[11] Revisional powers are conferred in order to enable the revising authority to do what the original authority could or ought to have done, and should therefore be limited to those objects The Commissioner therefore cannot initiate pro ceedings under section 34 or any other section, which invests the power of starting proceedings in a lower authority, merely by issuing orders under section 33 and can do so only by issuing executive orders to his subordinates But this does not mean that he cannot revise under section 33 proceedings started by the proper authority under section 34 or any other section It is one thing to set aside or revise the proceedings of a subordinate authority and another to supplement his proceedings without setting them aside, and assuming them to be valid There is no limitation if the Commissioner sets aside the proceedings of a subordinate authority but the power should be exercised within a reasonable time, with due regard to all the other provisions of

(10) 1 I T C 381
(11) *Jesaram v Commissioner of Income tax* 2 I T C 342.

the Act and the special features of the case In a case, therefore, in which the Assistant Commissioner had set aside the re assessment made under section 34 on the ground that the preliminary notice under section 34 had not been validly served and the Commissioner, without revising the finding of the Assistant Commissioner as to the invalidity of service of notice, purported to make the re assessment under his revisional powers after the lapse of the period of limitation laid down in section 34, it was held that the Commissioner's action was irregular He would have been acting within his powers if he had altered the finding of the Assistant Commissioner and revived the proceedings by declaring the service of notice to have been valid[12]

United Kingdom Law—

There is no corresponding provision in the English law An appeal there, once determined by the Commissioners (whether General Commissioners or Special Commissioners) is final and neither the determination of the Commissioners nor the assessment made thereon can be altered except by the order of the High Court to whom a case should be stated

Effect of this provision—

In theory, the additional provision in the Indian law no doubt cuts both ways, for it is open to the Commissioner of Income tax to re open a case as much to reduce an assessment as to enhance it In practice, however, the power is exercised more often in favour of the subject than against him

As already observed, the power can be exercised in respect of any proceeding under this Act—not merely assessments

In the absence of the exercise of the power under this section by the Commissioner the orders of the Assistant Commissioner are final and conclusive, unless a reference is made to the High Court under section 66

Revision when application under section 66 (2) pending—

The Commissioner is empowered to exercise this power in regard to questions of law raised by the assessee for reference to the High Court *See* proviso to section 66 (2) He can also exercise this power *suo motu*, when an application under section 66 (2) is pending before him, in regard to questions not raised in that petition—including of course questions of fact See *C T I S Chettiyar Firm v Commissioner of Income tax, Burma*[13]

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(12) *Sheik Abdul Kadir Marakayar & Co v Commissioner of Income tax* 2 I T C 372

(13) 122 I C 902

Reference to High Court—

No application lies to the Commissioner to ask him to state a case to the High Court in respect of an order under section 33 [14]

If any question of law arises, the Commissioner should refer the question *suo motu* to the High Court under section 66 (1) As regards the extent to which the High Court can compel a reference by the Commissioner in cases falling under section 66 (1), *see* notes under section 66 (1)

Penalty levied by the Commissioner—

If in the course of revisional proceedings, the Commissioner imposes a penalty under section 28 There is neither a right of appeal nor one of reference to the High Court against it [15]

33-A (1) Any person aggrieved by an order of an Income-tax Officer under sub-section (1) or sub-section (2) of section 23-A may, within thirty days of the date on which he was served with notice of such order, lodge an appeal in the office of the Commissioner

Reference to Board of Referees

(2) The appeal shall be in the prescribed form and shall be verified in the prescribed manner

(3) The Commissioner shall refer such appeal, with a statement of his own opinion thereon, to a Board of Referees for decision, and the Board of Referees shall decide the appeal after hearing the appellant and any person deputed by the Commissioner

Provided that, before making a reference to a Board of Referees, the Commissioner may, and at the request of the appellant shall, in exercise of his powers of revision under section 33, decide the matters in dispute, and thereupon the assessee may withdraw his appeal or proceed with it

(4) The decision of the Board of Referees shall be forwarded to the Commissioner who shall transmit it to

(14) *Sing Sen Hin v Commissioner of Income-tax* 2 I T C 33 *Jangi Bhagat Ramavatar v Commissioner of Income-tax, Bihar and Orissa* 3 I T C 418.

(15) *Jangi Bhagat Ramavatar v Commissioner of Income-tax, Bihar and Orissa* 3 I T C 418.

the Income-tax Officer who passed the original order, and shall also send copies to each Income-tax Officer who has made any assessment consequent upon such order; and where a decision reverses or modifies the order of the Income-tax Officer, fresh assessments shall be made in accordance therewith, or such consequential adjustments as may be required shall be made in any assessment already made.

(5) The decision of a Board of Referees shall not be subject to appeal to any Income-tax authority, and shall not be revised by the Commissioner in exercise of his powers under section 33.

(6) A Board of Referees shall consist of not less than three and not more than five persons, of whom not less than one-half shall be non-officials having business experience, and one shall be a judicial officer not inferior in rank to a Subordinate Judge or a Judge of Small Cause Court who has held judicial office for a period of not less than ten years

(7) Subject to the provisions of sub-section (6), the Central Board of Revenue may make rules regulating the formation, composition and procedure of Boards of Referees

Rule 22 A.—*An appeal to the Commissioner for a reference to a Board of Referees shall, in cases falling under sub-section (1) of section 23-A, be in form F, and, in cases falling under sub-section (2) of section 23-A, be in form G.*

FORM F.

To

The Commissioner of Income-tax,

———————————

The day of 19 .

The petition of———————sheweth as follows:—

1. The Income-tax Officer of———————, with the previous approval of the Assistant Commissioner of———————

has passed an order dated——————*of which a copy* is attached under sub-section (1) of section 23-A of the Indian Income-tax Act, 1922, that the sum payable as income-tax by the $\frac{\text{firm}}{\text{association}}$ known as——————shall not be determined and that the share of your petitioner in the profits and gains of the said $\frac{\text{firm}}{\text{association}}$ shall be included in his total income for the purpose of assessment; and a notice of the said order has been served upon your petitioner on the———day of————.

2. Your petitioner, being aggrieved, for the reasons stated below, by the order of the Income-tax Officer, prays that the said order may be set aside.

Signed——————

GROUNDS OF APPEAL.

Form of Verification.

I——————the petitioner, named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

Signed——————

FORM G.

To

The Commissioner of Income-tax,

——————

The day of 19 .

The petition of——————sheweth as follows:—

1. The Income-tax Officer of——————, with the previous approval of the Assistant Commissioner of—————— has passed an order dated——————of which a copy is attached under sub-section (2) of section 23-A of the Indian Income-tax Act, 1922, that the sum payable as income-tax by the company known as the——————shall not be determined and that the proportionate share of your petitioner in the profits and gains of the said company shall be included in his total income for the purpose of assessment; and a notice of the said order has been served upon your petitioner on the———day of————.

2. Your petitioner, being aggrieved, for the reasons set out below, by the order of the Income-tax Officer, prays that the said order may be set aside.

Signed——————

GROUNDS OF APPEAL

Form of Verification

I————————————, the petitioner, named in the above petition, do declare that what is stated therein is true to the best of my information and belief

Signed————————

RULES UNDER SECTION 33 A

NOTIFICATION

INCOME TAX

Simla, the 12th July, 1930

No 35—In exercise of the powers conferred by sub section (7) of section 33 A of the Indian Income tax Act, 1922 (XI of 1922), the Central Board of Revenue makes the following rules —

Rules

(1) The Commissioner of Income tax on receipt of an appeal under section 33 A of the Indian Income tax Act, 1922, shall, unless, in pursuance of the proviso to sub section (3) of that section, the appeal is withdrawn, appoint a Board of Referees consisting of not less than three and not more than five members chosen by him, subject to the provisions of sub section (6) of that section, from a panel constituted and maintained by the Central Board of Revenue

(2) Appointments to, and resignations or removals from, the panel shall be published in the *Gazette of India*

(3) The names of the members chosen by the Commissioner shall be communicated to the appellant within one week of receipt of the appeal in the Commissioner's office or of the decision of the Commissioner under section 33, as the case may be

(4) Within a period of fifteen days from the receipt of the communication, the appellant may object, without giving any reasons, to the inclusion of any name or names in the Board, and submit the names of not less than five members of the panel to whom he will not object

(5) In the event of an objection to any name, the Commissioner shall substitute a fresh name therefor, but shall not be bound to accept a name submitted by the appellant, and shall communicate it forthwith to the appellant

(6) The appellant may not subsequently object to the inclusion in the Board of any name submitted by himself

(7) The appellant shall be allowed one further period of fifteen days in which to object to names not originally included by the Commissioner nor submitted by himself.

(8) If the appellant has twice objected to the constitution of the Board proposed by the Commissioner, the Central Board of Revenue shall settle the composition of the Board and the decision of the Central Board of Revenue shall be final.

(9) The time and place of the first meeting of the Board shall be fixed by the Commissioner after consulting the members. The time and place of subsequent meetings shall be fixed by the Board and announced to the appellant and the Commissioner.

(10) The members of the Board shall elect their own Chairman.

(11) The decision of the Board shall be the decision of the majority of members present. All the members present shall sign the report, and any member who differs from the others may record a dissenting minute. Should there be an equality of votes, the Chairman shall have a casting vote. No decision of the Board which is signed by less than half the members shall be valid. The proceedings of the Board shall not be invalidated merely by reason of the absence of a member or his failure to sign the report of the Board.

History—

This was inserted by Act XXI of *1930*. The following extract from the report of the First Select Committee gives the history of this provision:—

"Clause 11 of the Bill as introduced provided a reference to the High Court on questions of fact as well as of law in cases where the income-tax authorities proceed against firms, associations and companies under the new section 23-A. Several of the High Courts have taken strong objection to this proposal. They point out that not only would this involve a great increase in the work of High Courts but also a new principle would be introduced into the law relating to the jurisdiction of High Courts by making it the arbiter of facts, a principle which might have serious repercussions in other branches of law. We are agreed that these objections are fatal to the original proposal and consider that the only possible alternative is to provide, as we do in this clause, for the reference of cases of this nature to Boards of Referees. The actual provisions governing the constitution and procedure of these Boards we propose to leave to rules but as the matter is of great importance to the commercial community we desire to outline briefly the manner in which we think they should be constituted."

Limitation—

The person aggrieved has thirty days' clear time, from the date on which he is served with a notice of the Income-tax

Officer's order under section 23-A (1) or (2). As regards service of notice, *see* section 63.

Finality of the decision of the Board of Referees—

The decision of the Board of Referees is final and not subject to appeal to any Income-tax authority or revision by the Commissioner. But a question of law can be raised by the person aggrieved and the Commissioner asked to refer the question to the High Court under section 66 (2). It would also apparently be open to the Commissioner to refer a question of law under section 66 (1), if he desires to refer of his own accord such a question arising out of an order by a Board of Referees.

Revision by Commissioner before reference to Board of Referees—

To avoid unnecessary appeals to Boards of Referees, the Commissioner has been empowered to decide appeals under this section under his own powers of revision under section 33, and it is then open to the assessee to withdraw his appeal to the Board of Referees or to proceed with it.

Hearing by the Board—

The Board is bound to hear the appellant and also a representative of the Income-tax Department deputed by the Commissioner. As regards time and place of hearing and of adjourned hearings, *see* rule 9 above.

Papers to be sent to the Board of Referees—

Presumably all the papers on the record which are necessary for the disposal of the appeal should be sent to the Board by the Commissioner.

Time within which the Commissioner should refer the appeal—

No time limit has been laid down within which the Commissioner should refer the appeal to the Board. He should evidently do so with reasonable despatch.

Decision—How to be acted upon—

The decision has to be communicated both to the Income-tax Officer who made the order under section 23-A (1) or (2) and to the Income-tax Officers who assessed the partners or members, because all of them are concerned.

Board of Referees—Composition of—

The Rules set out above are mostly based on the recommendation of the First Select Committee. The panel of names, it will be observed, is an all-India panel; and it is intended that the Commissioner should normally choose a panel from those residing in the neighbourhood so as to avoid inconvenience and loss of time in travelling. In forming the all-India panel, the Central Board of Revenue will doubtless arrange to appoint a

sufficient number of persons in each province willing to serve on Boards of Referees—the number being proportionate to the size and commercial importance of the province The First Select Committee also recommended that the Commissioner should be directed to avoid selection of persons likely to show bias either for or against the appellant, and should carefully consider the risk of an appellant's being compelled to disclose the details of his business to a trade rival

No rules have been framed regarding the remuneration and allowances of members of Boards of Referees

Persons "having business experience" are not necessary persons in business themselves

Income escaping assessment

34 If for any reason income profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains or in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be

Assessment of income which has escaped assessment in previous years—

Under the provisions of section 34 where income chargeable to income tax has escaped assessment in any financial year or has been assessed at too low a rate, the Income tax Officer may commence proceedings at any time within one period of twelve months reckoned according to the Gregorian Calendar from the end of the financial year in which the income so escaped assessment in order to get a full or proper assessment All that section

34 requires the Income tax Officers to do within the statutory period of one year is to *commence* proceedings for assessment It is not necessary that the proceedings should be completed within that period

A notice under section 34 need not specify the detailed grounds on which it is proposed to re open the assessment

The following form has been prescribed for the notice under section 34 —

Notice under S 34 of the Indian Income-tax Act (XI of 1922)

INCOME-TAX OFFICE,

Dated

To

Whereas I have reason to believe that your income from [16] chargeable to income tax in the year ending the 31st March, 19 ,

(*a*) has $\frac{\text{wholly}}{\text{partially}}$ escaped assessment,

(*b*) has been assessed at too low a rate, that is to say, at pies in the rupee instead of at pies in the rupee, and I therefore propose—

(*i*) to assess the said income that has escaped assessment,

(*ii*) to re assess your said income at the correct rate as aforesaid

I hereupon require you to deliver to me not later than or within 30 days of the receipt of this notice, a return in the attached form of your income from all sources chargeable to income tax during the said year ending

| Seal |

Income tax Officer

If it appears at any stage of the proceedings that no income has escaped assessment or been assessed at too low a rate, the Income tax Officer must promptly stop the proceedings It is not intended that when a man has concealed part of his income and the Income tax Officer is proceeding to assess the income that has escaped taxation, the assessee should be entitled to have an assessment that has already become final re opened Still less is it intended that the Income tax Officer should be invested with wide powers of revision or review merely because he has formed a mistaken impression that certain income has escaped assessment or been assessed at too low a rate His powers under section 34 can never be used, therefore, to effect a reduction of tax already levied

(16) Here enter source
(*a*), (*b*)—Unnecessary portions to be struck out

When income that escaped assessment or was assessed at too low a rate is subsequently assessed or fully assessed, the proviso to section 34 makes it clear that the rate applicable to such assessment or re assessment is the rate in force at the time when the income should originally have been so assessed (*Income tax Manual*, para 82)

Previous law—

This section is somewhat the same as section 25 of the 1918 Act

Income tax Officer alone can act under section 34—

The Commissioner of Income tax or Assistant Commissioner of Income tax cannot initiate proceedings under section 34 He can do so only by issuing executive orders to the Income tax Officer, who will take action under section 34[17]

Original assessment under appeal—

The fact that the original assessment has been or is the subject of an appeal to the Assistant Commissioner or under revision by the Commissioner does not preclude the Income tax Officer from assessing income which escaped assessment

Section 34 refers to a specific case, *viz*, the case where an income chargeable to income tax has escaped assessment or has been assessed at too low a rate The section does not require the whole assessment to be re opened In one sense, of course, the Income tax Officer must fix the taxable income to enable him to fix the rate of tax, but he is not bound to re open the items which are not in question On the other hand, he is bound to confine himself to the omitted item or items or to the enhancing of the rate, as the case may be[18] The words "assess or re assess such income" refer only to the income which escaped assessment, and the section therefore does not give a general power of review[20]

It is of course open to the assessee to show in any way he can that the income alleged to have escaped assessment has in fact not so escaped He can therefore show that the income was really assessed under some other head, but, if it has escaped, he cannot claim to have the assessment under other heads re opened on the ground that under those heads he had been over assessed[19]

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(17) *Sheik Abdul Kadir Marakayar & Co v Commissioner of Income tax* 2 I T C 372

(18) *P L M P L Palaniappa Chettiar v Commissioner of Income tax Madras Commissioner of Income tax Burma v T S T S Chettiyar Firm*

(19) In re *Kashinath Bogla (Allahabad)*

(20) In re *Satyendra Mohan Chaudri etc* 58 Cal 254

It is clear from the foregoing that the Assistant Commissioner dealing with an appeal against an assessment made under section 34 read with section 23 (3) is precluded from granting any further relief beyond the extra tax imposed under section 34.[20a]

Delayed completion of assessments—

This section is not intended to meet cases in which proceedings already begun under section 23 and connected sections have not been closed within the year. There is no limitation as to the period within which assessment proceedings, whether ordinary assessments or those under section 34 or 35, should be completed. The limitation laid down by this section applies only to the issue of the notice initiating the supplementary assessment proceedings.[21]

Appellate order—Assessment made in compliance with—Applicability of section 34 to—

When an Assistant Commissioner in appeal sets aside an assessment, and orders a fresh assessment to be made, the Income-tax Officer making the fresh assessment is not subject to the limitation of one year mentioned in section 34. The re-assessment is made under the explicit provisions of section 31, sub-section (3) (*b*) of the Act and not under section 34. Section 34 has therefore no application to such a case. The Act imposes no period of limitation in regard to proceedings under section 31.

"The end of the year"—

The expression "within one year *of the end of the year*" used in this section does not prevent the income that escaped assessment being assessed during the year of original assessment itself. This section only defines the latest date up to which proceedings could be started for assessing the escaped income.

Assessment by estimate—

The question whether section 34 can be used to re-open assessments under section 23 (4)—assessments by estimate in cases of default of the assessee—was raised in *Commissioner of Income-tax* v. *Sundaresa Iyer*,[22] and it was held that such an assessment can be re-opened if the Income-tax Officer finds that there has been under-assessment. This was followed by the Punjab High Court in *Manoharlal Deokarandas* v. *Commissioner of Income-tax*.[23]

(20a) In re *Kashinath Bogla (Allahabad)*.
(21) In re *Kedarnath Kesrilal (Calcutta)*.
(22) 2 I. T. C. 173.
(23) 3 I. T. C. 318.

Orders under this section appealable—

An order under section 34 can be appealed against, but not one under section 35.

Details of notice—

The notice under section 34 need not specify the detailed ground on which the assessment is proposed to be re opened—*Commissioner of Income tax* v *Sundaresa Iyer*[23a]

Applicable to all kinds of escaped income—

"Though the point is not raised in so many words in the reference Counsel contends that section 34 does not apply to the present case for another reason, namely, that this income in question has not 'escaped assessment' These words, he maintains, cannot be applied to a portion of homogeneous income but only to income of a different class and to a case where the assessee derives his income from different sources, *e g*, money lending and house property In this case the whole of the income *of the assessee is derived from money lending* The words used, *in my* opinion, do not admit of this interpretation and for every and any income whether it be of the same class or type as that originally assessed or of a different class or type clearly comes within the scope of section 34 "—*Per* Harrison, J in *Bulaqi Shah* v *Crown*[24]

It makes no difference whether the escaped income escaped alto gether or was taxed in the hands of some one else by mistake[25]

Irregular proceedings under sections 22 and 23—

If proceedings are started under sections 22 and 23 by the Income tax Officer having jurisdiction, and these proceedings are continued by an Income tax Officer not having jurisdiction, the proceedings can be resumed at any time by the first officer at the stage at which he left them, the subsequent irregular proceedings being ignored In such cases section 34 does not apply, and there is no time limit[25a]

Notice—Service of—Whether obligatory—

Though the word used is 'may' it will probably be held that it is the duty of an Income tax Officer to issue a notice in so far as the assessee has not had an opportunity of contesting the materials on which the supplementary assessment is sought to be made That is to say, while the section as a whole is permissive, if the Income tax Officer decides to act, he must issue a notice and follow the procedure in connection with original assessments as laid down by sections 22 and 23

(23a) 2 I T C 173

(24) 1 I T C 206

(25) *Ganesh Das* v *Commissioner of Income tax Punjab* 2 I T C 316

(25a) In re *Lachhiram Basantlal and Basantlal Vathani*, 57 Cal. 884

Notice—Nature of—

The Income tax Officer however need not issue a notice in the same terms as a notice under section 22 (2) The essential features of a notice under that section are that the assessee has to give the details of his income in a particular form and verify the information in a particular way If the information on which the supplementary assessment is proposed to be made has already been furnished by the assessee himself, though in some other connection, and it has also been verified by him, it is strictly speaking unnecessary for the Income tax Officer to issue a notice, though in practice the assessee is probably given an opportunity of being heard, on the analogy of the provision in section 35 On the other hand, if any of the information at the disposal of the Income tax Officer has either not been furnished by the assessee or not verified by him, the notice is necessary

But the notice may not ask for more particulars than can be demanded under section 22 (2) If the Income tax Officer requires such additional particulars he should proceed under section 37

Period for compliance with notice—

Though a notice need issue only in the circumstances described above, once a notice has issued, it is governed so far as may be by the provisions of section 22 (2), that is, it will be necessary to give the assessee at least 30 days' time to comply with the notice Similarly the same penalties will follow non compliance with the notice as in the event of non compliance with a notice under section 22 (2), *e g*, assessment under section 23 (4) and punishment under section 51

Calling for past accounts—

See *Kandaswami Pillai's case* set out under section 23 regarding the calling of accounts in the course of an assessment under section 23 with a view to finding out whether a supple mentary assessment should be made in respect of the preceding year

Default in complying with notice—

Where an assessee lumped together his income from two branches and the Income tax Officer afterwards suspected that a part of the income from one of the branches had escaped assess ment and accordingly issued a notice under section 34 asking for a return of income of that branch, the assessee, instead of fur nishing the return, merely drew the Income tax Officer's atten tion to the fact that he had already submitted a return in the first instance *Held*, that the assessee did not comply with the require

ments of the Income tax Officer whose object in issuing the notice was to know separately the income of the two branches and that an assessment under section 23 (4) was in order[26]

Under assessments due to misapprehension—

'Escaped assessment' is not confined to mistakes of omission only The words in the second alternative 'assessed at too low a rate' show that the escape need not necessarily be due to inadvertence It is therefore open to an Income tax Officer to re open an assessment deliberately wrongly made[27]

Estoppel and Res judicata—

The Income tax Officer and an assessee are not parties to a suit the subject matter of which is decided by a Court If in the course of making an assessment the Income tax Officer makes a mistake, or in order to secure some administrative convenience deliberately decides a point wrongly in favour of the assessee, he is not precluded from going back on his decision He is an executive officer who has to assess the revenue and so long as he does not contravene the provisions of the Act or act in an unjudicial spirit, no court will interfere Sections 34 and 35 are intended precisely to cover such acts of repairing omissions on his part *See also* notes under section 23

Registration of firm assessed under section 34—

Till February 1928 a firm that was being assessed under section 34 could not claim the benefit of registration As the rule now stands, the application for registration may be made even in respect of assessments under section 34 if no part of the income of the firm has been assessed in the usual course under section 23 That is to say, the benefit of registration is denied to a firm that conceals a part of its income or keeps quiet over a manifest mistake made by the Income tax Officer, but not to a firm that was not assessed at all in the first instance

Partners of firms—

The taxation of partners of firms at source is more a liability than a right and a partner cannot claim that the firm must be assessed and not he Therefore, if profits escape assessment through the firm not being taxed, proceedings can be started under section 34 against the partners direct without such proceedings being started against the firm [27-a]

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(26) *Ramachandra Kashinath v Commissioner of Income tax Bihar and Orissa* (unreported)

(27) In re *Sri Krishna Chandra Gajapati Narayan Deo* 2 I T C 104.

(27-a) In re *Neemchand Daga* 35 C. W N 534

United Kingdom Law—

The law in the United Kingdom relating to the assessment of income that escapes assessment is more cumbrous than in India An important difference is that the period of limitation is six years against the one year in India Similarly, in the United Kingdom the period of limitation for refunds is also six years as against the one year in India under section 50

Rectification of mistake

35 (1)[28][The Commissioner or Assistant Commissioner may, at any time within one year from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision under section 33 and] the Income-tax Officer may, at any time within one year from the date of any demand made upon an assessee, on his own motion, rectify any mistake apparent from the record of the [appeal, revision or] assessment, [as the case may be,] and shall within the like period rectify any such mistake which has been brought to his notice by *the* assessee

Provided that no such rectification shall be made having the effect of enhancing an assessment unless [the Commissioner, the Assistant Commissioner or] the Income-tax Officer, [as the case may be,] has given notice to the assessee of his intention so to do and has allowed him a reasonable opportunity of being heard

(2) *Where any such rectification has the effect* of reducing the assessment, the Income-tax Officer shall make any refund which may be due to such assessee

(3) Where any such rectification has the effect of enhancing the assessment, the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under section 29, and the provisions of this Act shall apply accordingly

(28) The words in brackets were inserted by Act III of 1928, the word 'such' was changed into 'the' by the same Act

Rectification of mistakes in assessments—

The power conferred upon Commissioner or Assistant Commissioner of Income tax or the Income tax Officer by section 35 to rectify a mistake, whether on his own motion or on the application of an assessee, is confined to the rectification of mistakes patent from the facts or documents which were before him when he passed his revisional, appellate or original assessment order as the case may be This section does not confer on Officers a general power of review or authorise any assessee to introduce any new facts in connection with the said assessment. An Income tax Officer should not correct mistakes in cases that have been dealt with by the Assistant Commissioner on appeal or the Commissioner of Income tax in revision without a reference to the Assistant Commissioner or the Commissioner of Income tax as the case may be (*Income tax Manual*, para 83)

Mistake—

"Mistake" is not mere forgetfulness (per Esher, M R, *Barrow* v *Isaacs*), it is a slip "made, not by design, but by mischance" (per Russell, C J, *Sandford* v *Beal* [29] *S* v *Prescott* v *Lee*, infra), *Cf* 4 Bl Com 27 (Stroud)

History—

Under the 1918 Act the Collector could rectify mistakes only when brought to his notice by the assessee but the present section, it will be seen, empowers the Income tax authorities to correct mistakes of their own motion but requires the assessee to be heard if there is to be an enhancement Till April 1928, when the section was amended, the power of rectification of mistakes was confined only to the Income tax Officer in respect of original assessments

Income tax Officer cannot review his order—

As regards the difference between the correction of a mistake and a revision, *see* notes under section 33

No appeal lies against an order under section 35, as indeed it cannot, when the object of the section is to provide for the correction of an *obvious* mistake If the Income tax Officer abuses his power and uses it not for correcting an obvious mistake but to revise his order and re open questions of substance, the additional assessment would be *ultra vires*, and a civil court can presumably interfere No reference to the High Court can be made except under section 66 (1) as orders under section 35 are not appealable

(29) 65 L J Q B 74, 73 L T 406

United Kingdom Law—

For similar provisions, *see* sections 120 (2) and 121 (6) of the United Kingdom Act of 1918

Limitation of period—

Under this section, the rectification should actually be *made* within one year from the date of *demand* as explained below If the assessee delays without reason, it would be sufficient if the notice had been served on the assessee a little earlier than one year from the date of demand As to what is a reasonable opportunity, the Income tax authority concerned is ordinarily the sole judge, and there is no appeal against orders under section 35 *See*, however, notes under sections 27 and 33 as to 'reasonable opportunity' and 'sufficient cause'

'Demand' applies to a determination of a sum or extra sum payable by the assessee in such manner as to bind the assessee Therefore the time runs from the making of the revised assessment under section 34 or on appeal or on revision, and not from the date of the original demand [30]

Mistakes apparent from the record—

In *Jubilee Mills* v *Commissioner of Income tax*,[31] a case under section 26 of the 1918 Act it was held that the section was intended only to rectify mistakes caused by the demand not corresponding to the assessment and not to provide appeals to the Commissioner from an order of the Collector under section 26, either rectifying a mistake or refusing to rectify it The words 'apparent from the record'' bring out the substance of the first part of this decision There were no such words in the 1918 Act

A firm possessed five collieries which had been assessed separately in the names of three persons When the Income tax Officer came to know that the same firm possessed all the five collieries he issued a notice purporting to issue under section 35 (but really under section 34) a notice of proposed supplemental assessment This evoked an application from the assessee firm (purporting to be heard under section 35) alleging that the previous returns had omitted certain losses and asking for a refund of excess tax paid The Commissioner rejected the application for refund and also dropped the proceedings under section 34 *Held*, that there was no mistake apparent on the face of the record of the assessment within the meaning of section 35 [32]

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(30) *Tricumchand Dansing* v *The Chief Revenue Authority Bengal* 2 I T C 136

(31) 2 I T C 25

(32) *Trikamji Jivan Das* v *Commissioner of Income tax* 1 I T C 406

Cases remanded on appeal—

In a case remitted by the Assistant Commissioner on appeal, the Income tax Officer decided the points in issue in favour of the assessee but at the same time rectified a mistake without, however, giving an opportunity to the assessee to show cause against The Assistant Commissioner cancelled this rectification but reduced the assessment to the original figure, instead of cancelling the assessment altogether A question of law was held to arise out of the Assistant Commissioner's appellate order[33]

36 Tax to be calculated to the nearest anna In the determination of the amount of tax or of a refund payable under this Act, fractions of an anna less than six pies shall be disregarded, and fractions of an anna equal to or exceeding six pies shall be regarded as one anna

Elimination of pies from assessment—

Income tax Officers should also be instructed not to attempt to work out the income tax due on fractions of a rupee Fractions of a rupee in *income* should be entirely disregarded (*Income tax Manual*, para 84)

37 Power to take evidence on oath etc The Income-tax Officer, Assistant Commissioner and Commissioner shall, for the purposes of this Chapter, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters, namely —

(*a*) enforcing the attendance of any person and examining him on oath or affirmation,

(*b*) compelling the production of documents, and

(*c*) issuing commissions for the examination of witnesses,

and any proceeding before an Income-tax Officer Assistant Commissioner or Commissioner under this Chapter shall be deemed to be a "judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code

(33) *Delhi Cloth and General Mills Ltd v Commissioner of Income tax*, 117 I C 383

History—

Corresponds to section 27 of the 1918 Act and sections 28 and 37 of the 1886 Act

The words "for the purposes of section 196" were added by Act XXII of 1930 These words neutralise the effect of the ruling of the Calcutta High Court in *Lal Mohan Saha v The Crown*[34]

Scope of section—

This section does not by itself make an Income tax Officer or Assistant Commissioner or Commissioner a Court or a Judge for all purposes All that this section does is to confer specific powers on these officers in order to enable them to achieve a specified object, *viz*, the assessment of tax in as reasonable and equitable a manner as possible, which requires the eliciting of information—it may be, from third parties—which is necessary for the assessment The ordinary rules of procedure in regard to evidence as followed in Courts do not apply to these proceedings before these officers under the Income tax Act *See,* however, notes under section 23 and section 52

Penalties—

The penalties for disobeying the summons of the officers of the Income tax Department issued under this section are the same as for disobeying similar summons issued by a civil court An assessment cannot be made under section 23 (4) merely because an assessee fails to respond to a summons under this section, or even if he perjures himself An assessment can be made under section 23 (4) only if the conditions therein set out are satisfied

As regards the penalties for absconding in order to evade summons or notice being served, disobeying summons to appear or to produce documents, or for refusing to be sworn in, *see* section 172 *et seq* in Chapter X, Indian Penal Code

See also sections 195 and 476 *et seq* of the Criminal Procedure Code, regarding the procedure for prosecuting such offenders, etc

Civil Procedure Code—Applicability of—Details of—

Extracts from Orders 5, 13, 16 and 26 of the Civil Procedure Code, 1908, have been set out in the Appendix All the rules in these orders will not apply to the Income tax Department They will apply only to the extent set out in the section, *viz*, —

(34) 2 I T C 428

(*a*) enforcing the attendance of persons and examining them,

(*b*) compelling the production of documents, and

(*c*) issuing commissions

Income tax Officer—Revenue Court—

In re *Punamchand Maneklal*[35] it was held that an Income tax Officer is a revenue Court for the purpose of clauses (*b*) and (*c*) of section 195 of the Criminal Procedure Code

Effect on section 61—

Though section 61 permits the assessee to appear through an agent, it does not exempt the assessee from being summoned by the Income tax Officer under this section, if the Income tax Officer considers the assessee's personal attendance necessary

'For the purposes of this Chapter'—

That is, in respect of matters connected with deduction at source, assessments, appeals, revision, etc The powers cannot be exercised in respect of proceedings under other Chapters, *e g*, Recovery of tax (Chapter VI), Penalties (Chapter VIII) or Refunds (Chapter VII)

False evidence—Section 193, Indian Penal Code—

' 193 Whoever intentionally gives false evidence in any stage of a judicial proceeding or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine
and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine

Explanation 1—A trial before a Court martial is a judicial proceeding

Explanation 2—An investigation directed by law preliminary to a proceeding before a Court of Justice is a judicial proceeding though that investigation may not take place before a Court of Justice

Illustration

A, in an enquiry before a Magistrate for the purpose of ascertaining whether *Z* ought to be committed for trial, makes on oath a statement which he knows to be false As this enquiry is a stage of a judicial proceeding 1 has given false evidence

Explanation 3—An investigation directed by a Court of Justice according to law and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding though that investigation may not take place before a Court of Justice

(35) 38 Bom 642.

Illustration

A, in an enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false As this enquiry is a stage of a judicial proceeding *A* has given false evidence "

Intentional insult or interruption to Income-tax Officer—Section 228, Indian Penal Code—

'228 Whoever intentionally offers any insult or causes any interruption to any public servant while such public servant is sitting in any stage of a judicial proceeding shall be punished with simple imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both "

Section 196 Indian Penal Code—Prosecution under—

The ruling of the Calcutta High Court in the case of *Lal Mohan Saha*[36], that in view of section 37 of the Income tax Act no punishment was possible under section 196, Indian Penal Code in respect of corrupt use of false or fabricated evidence before Income tax authorities had overlooked the fact that the first part of section 193, Indian Penal Code, refers to giving or fabricating false evidence in a *judicial proceeding* and the second, to giving or fabricating such evidence in *any other case*, and that section 196, Indian Penal Code, which deals with the corrupt use of such evidence, applies as much to cases in which such use is made in judicial proceedings as to those in which it is made otherwise This decision however is now obsolete in view of the insertion in section 37 of the Income tax Act of the words "for the purposes of section 196"

United Kingdom Law—

Under section 144 of the United Kingdom Act of 1918, the General Commissioners can summon witnesses and examine them on oath The penalty for disobedience or refusal to be sworn in or to answer questions is £20 But the Special Commissioners may not, except in certain circumstances, summon witnesses Their enquiries, however, are answered by affidavits before the local General Commissioners—*see* section 67 (3) *ibid*

Power to call for information.

38 The Income-tax Officer or Assistant Commissioner may, for the purposes of this Act,—

(1) require any firm, or Hindu undivided family to furnish him with a return of the members of the firm,

(36) 2 I T C 428

or of the manager or adult male members of the family, as the case may be and of their addresses,

(2) require any person whom he has reason to believe to be a trustee guardian, or agent to furnish him with a return of the names of the persons for or of whom he is trustee, guardian or agent and of their addresses

Penalties—

For penalties for failure to comply, *see* section 51 (*c*)

Sub section (2)—

The Income tax Officer must, of course, have 'reason to believe' before he can use his powers under sub section (2)

Form of notice—

No form of notice has been prescribed under this section, at his option, the Income tax Officer may summon these persons under section 37

False statements—

Section 52 provides for prosecution only in respect of false declarations under sections 22, 30 (3) and 32 (2), however a false statement furnished under section 38 could perhaps be dealt with under section 177, Indian Penal Code *i e*, the person proceeded against for giving false information

Time limit—

No time limit has been fixed within which the information need be furnished under this section Before a prosecution is started under section 51, the Income tax Officer should give the persons concerned reasonable time within which to comply with his demands

United Kingdom Law—

There are no directly corresponding provisions in the United Kingdom Law but *see* the *Fifth Schedule* of the 1918 Act, Part XVI

Power to inspect the register of members of any company

39 The Income-tax Officer or Assistant Commissioner, or any person authorised in writing in this behalf by the Income-tax Officer or Assistant Commissioner, may inspect and, if necessary, take copies, or cause copies to be taken, of any register of the members, debenture-

holders or mortgagees of any company or of any entry in such register

Fees not payable—

As the right is conferred on the officers of the department by statute, they need not pay any fees for inspection under sections 36 and 125 of the Indian Companies Act (1913)

See notes under section 22 (4), and more particularly the instructions in the Income tax Manual reproduced in the notes under that section as to the extent that Income tax Officers may call for these books

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CHAPTER V

Liability in Special Cases

40 In the case of any guardian, trustee or agent of any person being a minor, lunatic or idiot or residing out of British India (all of which persons are hereinafter in this section included in the term beneficiary) being in receipt on behalf of such beneficiary of any income, profits or gains chargeable under this Act, the tax shall be levied upon and recoverable from such guardian, trustee or agent, as the case may be, in like manner and to the same amount as it would be leviable upon and recoverable from any such beneficiary if of full age, sound mind, or resident in British India, and in direct receipt of such income, profits or gains, and all the provisions of this Act shall apply accordingly.

Guardians trustees and agents

Fiduciaries—

In the case of trusts, the Act does not permit of any double taxation, *viz*, once in the hands of a trustee and once in the hands of a beneficiary Sections 40 and 41 of the Act which provide for the trustee in particular cases being liable for the tax in place of the beneficiary, make it perfectly clear that it is only in cases covered by these sections that a trustee can be required to pay the tax (*Income tax Manual*, para 85)

It should be particularly noted that this section applies only to the guardians, trustees and agents specified here As regards the taxation of trusts generally, *see* notes below and also under section 3 *See also* the ruling of the Lahore High Court in the *Hotz Trust case* .

Previous law—

This section corresponds to section 31 of the Act of 1918 and sections 20 and 21 of the Act of 1886

Machinery Chapter—

With the exception of a portion of section 42 (1) which provides that income, profits or gains accruing or arising to a non resident from business connection or property in British India shall be deemed to accrue or arise in British India, all the sections in this Chapter are only machinery sections and not charging sections

Executor—Under will—Liable to tax—

In *Forbes* v *Secretary of State*,[37] a case under the 1886 Act which however was substantially the same as the present Act in this particular matter, it was held that the income accruing to an executor of a will was taxable The contention on behalf of the executor was that he was not the beneficial owner of the income and that there was no express provision in the Act to tax him as there was in the case of trustees, guardians, etc

United Kingdom Law—

See Rule 4 of the General Rules under all schedules The Rule does not require the trustee, etc, to be actually in receipt of profits; all that is necessary is that he should have the 'direction, control or management of the property or concern' of the bene ficiary But it has been suggested in *Huxley's* case cited below that if the infant himself is directly taxed, the guardian will not be liable unless he is in receipt of the profits

Rule 5 which relates to non resident beneficiaries says that the resident trustee, agent, etc, shall be taxed, whether he is in receipt of the profits or not, as though the beneficiary were resident in England and in receipt of the profits or gains

Rule 1 is as below "Every body of persons shall be charge able to tax in like manner as any person is chargeable under the provisions of this Act"

In the *Hotz Trust case*, the Lahore High Court observed that there is little difference between this Rule 1 and sections 3 and 10 of the Indian Act

Liability of trustee limited to profits in his hand—

In India it is clear that the liability of the trustee should be confined to the profits that come into his hands, this is provided for by the words "being in receipt on behalf of the beneficiary of any income, etc" The income received is the income

(37) 1 I T C 8, 42 Cal 151

liable to be taxed, and the tax obviously must be limited to the income The Crown cannot recover tax due from the beneficiary on other accounts through the trustee or guardian or agent, the liability of the latter being confined to what he receives

Scope of section as regards non residents—

This section applies only when the resident agent of the non resident is in receipt of the profits of the non resident If he is not so in receipt, the taxation of the non resident is regulated by section 42 *See*, however, notes on section 43 regarding the extent to which the profits liable to be taxed under section 42 can be taxed in the hands of the agent

Minor may be taxed direct if no guardian—

In *R* v *Newmarket Commissioners* (Ex parte *Huxley*)[38] in which the assessee was a minor without a guardian, it was contended on behalf of the assessee that though he earned substantial sums from his profession of a jockey he could not be taxed because he was not a 'person', and that a minor could be taxed only if there was a guardian or trustee In the King's Bench Division a bench of three judges unanimously held that the minor could not be taxed but the decision was reversed unanimously by the Court of Appeal

Per *Phillimore L J*— It was urged that the making of a return is a matter of difficulty and that an infant is not supposed by the law to be capable of doing such difficult business matters that every subject who is assessed has a right of appeal and that an appeal is in the nature of a *lis* and that no *lis* in which an infant is concerned can be conducted in the Courts unless he has a guardian *ad litem* I think the answer is that in most if not quite all of the rare cases in which an infant becomes chargeable it would be because of his exceptional and precocious skill that such infant may be presumed to be capable of of either making a return or of instructing and paying some competent adviser and that the analogy of a *lis* must not be pushed too far

It is not necessary to consider what might be the decision if the infant had a guardian having the direction and control or management of his property and the Crown was minded nevertheless to require a return from the infant But in that case the decision in another part of the same section *viz*—*Tischler* v *Apthorpe*[39] approved as it was in this Court in the case of *Werle & Co* v *Colquhoun*[40] would have to be reckoned with

Per *Warrington L J*— Huxley contends that the law treats all infants whether babies in arms or men of twenty years of age as equally incapable But I think the legal doctrine of

(38) 7 Tax Cases 49

(39) 2 Tax Cases 89

(40) 2 Tax Cases 402

equality of incapacity has reference to the question of status before the law, and for the purpose of construing such an Act as the present, it has no applicability "

Per *Phillimore, L J*—'But guardians will not be liable for the infant s default if they have not received or had the control of the infant s income "

Non resident may be taxed direct if accessible—

In *Tischler* v *Apthorpe*[40a] in which the assessee was a foreign firm doing business in the United Kingdom, it was held that the right of the Crown to tax the local agent if necessary did not take away the right to tax the foreign principal directly if he could be got at for the service of notice, etc *See* also the case of *Bhanjee Ramjee & Co*[41] cited under section 42

Remittances from non resident trustees—Resident beneficiaries—

In *Drummond* v *Collins*[42] a non resident left property situate abroad upon trust for the children of his deceased son The trustees under the will were directed to accumulate the income of the respective shares of the children on certain conditions The will also directed that "out of the net income of the proportionate share of the trust estate held in trust for any child" the trustees might in their uncontrolled discretion provide from time to time for maintenance and education of such child The children lived with their guardian, the mother, in the United Kingdom From time to time, the trustees remitted moneys to the mother on behalf of the children It was contended that the moneys were not liable to tax, firstly because they were voluntary payments, and secondly because the mother had no control of the foreign property *Held*, that the payments in question were taxable The second of the above contentions cannot arise under the Indian law because of the difference in the wording of Case V of the English Schedule D and the wording of sections 4 and 6 of the Indian Act In the English law, the income under Case V is from a foreign "possession", the word which gave rise to the argument In India, on the other hand, all income received in India from abroad is taxable if it is profits from a *business* and if it is received within three years

Per *Lord Loreburn*—' I do not assent to the proposition that a voluntary payment can never be charged but it is enough to say that these were not voluntary payments in any relevant sense They were payments made in fulfilment of a testamentary disposition for the benefit

(40a) 2 Tax Cases 89
(41) 1 I T C 147
(42) (1915) A C 1011 6 Tax Cases 525

of the children in the exercise of a discretion conferred by the will They were in fact the children's income "

Per *Lord Parker*—" . . Though they might be incapable, because of their age, of giving a receipt for the money, it is in my opinion none the less clear that the money in question was, as soon as the trustees had exercised their discretionary trust, held in trust for these infants as beneficiaries "

Per *Lord Wrenbury*—"Let me however assume that . the interest of the infants is contingent, that is to say, the income of another (the person entitled under the gift over) in another contingency It remains however that in this case the trustees exercise their discretion in favour of the child, the interest of the child ceases to be contingent and becomes vested Whether the money is paid to the child or to the guardian of the child or to the schoolmaster or to the tailor or other person who supplies the wants of the child, it is paid to or to the use of the child and is the income of the child "

Does liability of trustee depend on liability of beneficiary?—

Per *Viscount Cave*—" . Indeed, I understood Mr Cunliffe to go so far as to say that, when funds are vested in trustees, the Revenue authorities are entitled to look to those trustees for the tax, and are neither bound nor entitled to look beyond the legal ownership

My Lords, I think it clear that such a proposition cannot be maintained If the legal ownership alone is to be considered, a beneficial owner in moderate circumstances may lose his right to exemption or abatement by reason of the fact that he has wealthy trustees, or a wealthy beneficiary may escape super tax by appointing a number of trustees in less affluent circumstances Indeed, if the Act is to be construed as Counsel for the appellant suggests, a beneficiary domiciled in this country may altogether avoid the tax on his foreign income spent abroad by the simple expedient of appointing one or more foreign trustees Accordingly I put this contention aside On the other hand, I do not think it would be correct to say that, whenever property is held in trust, the person liable to be taxed is the beneficiary and not the trustee Section 41 of the Income tax Act 1842, renders the trustee, guardian or other person who has control of the property of an infant, married woman or lunatic chargeable to income tax in the place of such infant, married woman or lunatic . And, even apart from these special provisions, I am not prepared to deny that there are many cases in which a trustee in receipt of trust income may be chargeable with the tax upon such income For instance, a trustee carrying on a trade for the benefit of creditors or beneficiaries . or a trustee who is under an obligation to apply the trust income in satisfaction of charges or to accumulate it for future distribution, appears to come within this category, and other similar cases may be imagined The fact is that if the Income tax Acts are examined, it will be found that the person charged with tax is neither the trustee nor the beneficiary as such but the person in actual receipt and control of the income which it is sought to reach The object of the Acts is to secure for the State a proportion of the profits chargeable,

and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found If the beneficiary receives them, he is liable to be assessed upon them If the trustee receives and controls them, he is primarily so liable If they are under the control of a guardian or committee for a person not *sui juris* or of an agent or receiver for persons resident abroad, they are taxed in his hands But in cases where a trustee or agent is made chargeable with the tax, the statutes recognise the fact that he is a trustee or agent for others, and he is taxed on behalf of and as representing his beneficiaries or principals . . . . In short, the intention of the Acts appears to be that, where a beneficiary is in possession and control of the trust income and is *sui juris*, he is the person to be taxed, and that, while a trustee may in certain cases be charged with the tax, he is in all such cases to be treated as charged on behalf or in respect of his beneficiaries who will accordingly be entitled to any exemption or abatement which the Acts allow ."—*A W Williams* v *W M G Singer and others* and *A F. Pool* v. *Royal Exchange Assurance*[43]

Per *Lord Phillimore*—" It was suggested by Counsel for the appellant that the Income tax Acts except in certain special and rather narrow instances, took no account of the position of trustees but regarded only the legal ownership On the other hand, from some of the language in the judgment of the Court of Appeal, especially that of Lord Justice Warrington it would appear that a contention that the Income-tax Acts looked generally to the beneficiary and disregarded the trustee except as a means of reaching the beneficiary in certain rare cases, had found favour I do not propose to express an opinion whether either, or which if either, of these two extreme views is right .

" It may perhaps be said that, where there is a trust for accumulation or for payment of debts no person can be said to be entitled to the receipt of the profits and that in such case the trustee is to be the person to be assessed It is possible also that where trustees have the management of a business they should be the persons to be assessed or charged There are disbursements which may have to be made in the course of conducting a business which a prudent owner would consider as deductions from profits and which trustees would make before they paid the net income over to the beneficiary but which, nevertheless, for income tax purposes as the law at present stands are not considered as legitimate deductions from income—cases of which the decision of this House in *Strong & Co* v *Woodifield*[44] is an example In these cases if the Revenue is to receive its full quota, it would seem that the assessment must be put upon the trustee and not upon the beneficiary, and that in such cases the trustee is the person to be assessed The case now before your Lordships is not one of such cases " (*Ibid*)

"We hear of no matters in which a conflict between capital and income and their respective interests has arisen, nor of any business car-

(43) 7 Tax Cases 410

(44) 5 Tax Cases 215, (1906) A C 448

ried on by the trustee as to which the more complex case of trading profits would replace the plain case of dividends paid. If there had been annuitants with a prior right to be paid or several beneficiaries entitled to share in the income, if there had been reversioners who could claim that part of the annual profits were in the nature of accretions to capital, if there was a trust for accumulation or a power to vary the amounts payable from time to time as between minors, the impracticability of saying that any or all of the beneficiaries entitled to the income owned the whole or any part of that income from the moment it became payable and was paid and to the full extent of the amount paid would be evident."—Per *Lord Sumner* in *Baker* v. *Archer-Shee*.[45]

Expenses of management of trust—

If a will or settlement creates a trust providing for the payment of the cost of management and a gift of the remainder of the income to a beneficiary, the income of the beneficiary is the net income after deducting the expenses of management of the trust.[46] But this has been overruled by the House of Lords in *Baker* v. *Archer-Shee, infra.* If the trust does not provide for the expenses of management, the income of the beneficiary should be taken as the gross income of the trust in all cases irrespective of the circumstances. This point has of course nothing to do with the question whether the trustee can claim to deduct from his taxable income as trustee, expenses of management in those cases in which he is taxed (and not the beneficiary). In such cases, expenses of management would not ordinarily be allowed as a deduction, as such expenses would not be necessary for earning the income that is the subject of charge.[47]

Under a trust made by himself, the assessee was the life-tenant with remainders over. All the expenses and liabilities were to be met by the trustees out of the income. One of the terms of the trust gave the assessee the right to receive the whole or any part of the income and spend it on legitimate payments connected with the estates. It was held that this condition amounted to his being given a mandate to administer the estate on behalf of the trustees and that his own income was the net income after deduction of expenses.[48]

Business—Carried on by trustees—

A testator who died in 1906 directed his trustees, *inter alia*, to pay to his sister the life-rent of certain insurance monies and

(45) 11 Tax Cases 749

(46) *Murray* v *Commissioners of Inland Revenue*, 11 Tax Cases 133

(47) See *Aikin* v *Macdonald's Trustees* 3 Tax Cases 306

(48) *Commissioners of Inland Revenue* v *Lord Hamilton of Dalzell*, 10 Tax Cases 406

to pay the full annual proceeds of the residue of the estate to his widow for her maintenance and that of his children The widow died in 1908 leaving two minor daughters (Both these daughters and the aunt, the testator's sister, were alive in 1914 when the case arose) Under the will, each daughter was to acquire, on attaining majority, an absolute interest in one half of the trust estate subject to the aunt's life rent If either sister died in minority leaving issue which attained the age of 21 years or married (if a female), such issue was to take the parent s prospective share Failing issue, the prospective share of the predeceased was to go to the surviving sister During minority the daughters had no absolute right to any part of the income, and the trustees had discretion to apply the whole or part of the prospective share of each sister to her maintenance and education In addition to the insurance money, the estate consisted of heritable property and the wine merchant s business of the testator The trustees, acting in the exercise of an express power to that effect carried on the business The entire net profits were paid over annually to or on behalf of the minor daughters

Held that the business was that of the trustees and not that of the beneficiaries

The real reason why business has not been handed over by the trustees to the Misses Shiels was not any technical difficulty in the way of obtaining a discharge from minors unprovided with a guardian but the much more formidable difficulty that the trustees could not have denuded in favour of minor beneficiaries without committing a breach of trust Such a trustee could not have been regarded either as a simple trustee who was bound to denude in their favour when called upon [49]

Income—Whether belonging to trustee or beneficiary—

In *Baker v Sir Martin Archer Shee* [50] Lady Archer Shee s father who was a foreigner had directed by his will that his estate should be held in trust and that the trustees should apply the whole of his income to the daughter s use The trust fund consisted of American securities and the trustees were in America where the income was realised From time to time the trustees placed sums of money to the credit of Lady Archer Shee in an American Bank, after retaining sums necessary to pay income tax etc in America The trustees had power to change the investments at their discretion The question was whether the assessment should be made only on the amount remitted to the United Kingdom or whether the whole of the amount placed

(49) Per *Lord Skerrington in Fry v Shiels's Trustees* 6 Tax Cases 585
(50) 11 Tax Cases 49

to the credit of Lady Shee in America could be taxed It was contended that the lady was entitled only to the interest from the estate, and that this interest was not a "foreign possession," and that the owners of the securities, *viz*, the trustees, were non residents, and that therefore only the amounts actually brought into the United Kingdom by the lady could be taxed

Rowlatt, J, while conceding that what the lady had was not a right to specific property but only the right in equity to compel the trustee to discharge his trust properly, *held* that the trustees should be dropped out for the purpose of determining liability to income tax, and that, since, had the trustees been in England, they would have been assessed, the beneficiary should be assessed in the absence of the trustees who were outside the United Kingdom His reading of the decision of the House of Lords in *Williams* v *Singer*[1] was that in that case the beneficiary being abroad herself her interest was from a foreign source and as she was herself not taxable her trustees were also not taxable, and that if the beneficiary had been in England she would have been liable to tax on those stocks and shares on which it was held the trustees were not liable

The Court of Appeal reversed Rowlatt, J 's decision on the ground that what the beneficiary received was not the dividends in specie but the balance after the trustees had carried out their trust and defrayed expenses and the sums paid were "no longer clothed in the form in which it was originally received, having no trace of its ancestry" (per *M R Hanworth*) They followed *Sudeley* v *Attorney General*[2] and emphasised the fact that Lady Archer Shee had only an equitable right and not a specific right in the income

The House of Lords reversed the decision of the Court of Appeal by a majority of three to two Lord Sumner considered that the stocks, etc, belonged only to the trust and not to the beneficiary who had only an equitable right Lord Blanesburgh agreed with him and emphasised the fact that the assessee was sole beneficiary only by accident and that at one time her mother was also a beneficiary Incidentally he approved of the ruling in *Murray* v *Commissioners of Inland Revenue*[3] Lords Atkinson, Wrenbury and Carson, on the other hand, held that on the facts of the case the administration of the estate had been concluded, that Lady Archer Shee's interest had become vested in her and

(1) 7 Tax Cases 410
(2) (1897) A C 11
(3) 11 Tax Cases 133

that the trustees were only her agents The majority's decision results in the overruling of the Scottish Court's decision in *Murray's case* referred to above.

Who should be taxed—Beneficiary or trustee—

The arguments in support of the view that it is the beneficiaries alone that are to be taxed under the Indian law are as below Though sections 40 and 41 are only 'machinery' sections and not charging ones, they make it clear that the person in respect of whose income the tax is payable is the beneficiary, though the tax is collected from the person managing, *i e*, guardian, trustee, agent, Court of Wards, Administrator General, Official Trustee or Receiver or Manager The trustee himself is not taxed, although the income yielding property is vested in him In ascertaining the 'total income' of a person under section 3, you cannot add to his own income otherwise than as trustee the income received by him as trustee The beneficiary is obviously the unit for the purpose of taxation, and it is the total income of the beneficiary which is liable to assessment Special provision is made in the Act for an undivided Hindu family which is treated by virtue of section 2 (9) as a unit, and this provision cannot be extended by analogy to cover a trust created for the benefit of more than one person Nor can the beneficiaries be considered to be an "association of individuals" which *prima facie* seems to imply a voluntary association for gain Various anomalies and difficulties similarly follow if it is held that the person sought to be taxed by the Act is the trustee and not the beneficiary. There is no provision in the Act for grouping a number of trustees as a unit, as in the case of a "firm" or "Hindu undivided family" Nor can the trustees be considered an "association of individuals" which *prima facie* seems to imply a voluntary association for gain Therefore, when there are more than one trustee, they must be dealt with separately Is the income of the trust fund to be added to the private income of each trustee in order to ascertain his total income? That would lead to the trust income being made liable as many times as there are trustees, for, trustees hold in joint tenancy and not tenancy in common Section 40 says that tax is levied upon a trustee to the same amount as it would be leviable from the beneficiary if of full age, etc The amount taxed, therefore, is not what the trustee gets, but what the beneficiary would have got In other words, it is the beneficial interest which is taxed Take, again, the case of a person who is a trustee of several separate trusts Are the incomes of the different trust funds to be added to the trustee's

own income to arrive at his total income? That may lead to a much higher rate being levied than the different trusts would respectively warrant If the trustees be taxed as owners, and the beneficiaries receive their share of the income from the trustees, there is no provision in the Act exempting the beneficiaries from taxation in respect of such shares

It will be seen that most of these arguments rest upon the absence of a provision in the Act for taxing the trustee *qua* trustee, *i e*, as a distinct *person* from him as an individual But it is submitted that such express provision is not necessary The trustee *qua* trustee is, at any rate, for the purpose of taxation, presumably, a different 'person' from the trustee in his private capacity, and he can and must therefore be treated as two separate individuals within the meaning of section 3 Also if there are several trustees there is no reason why they should not constitute an "association of individuals" under section 3 There is nothing in the scheme of the Act to suggest that an association of individuals must be a voluntary association for gain Moreover the line of reasoning, which seeks to tax beneficiaries only (and which, of course, has been stated in its extreme form), skates over certain difficulties If the trustee is accumulating income for the contingent benefit of somebody else, it would clearly be impossible to tax the beneficiary, inasmuch as the benefit to him is only contingent Nor would there be any double taxation because the beneficiary, who does not receive anything, cannot be taxed Also, in the case of a business carried on for the benefit of creditors, etc, it is clearly proper to tax the trustees who are really conducting the business Again, in the case of a business carried on by trustees, even if the profits are at once distributed between beneficiaries the taxation of beneficiaries instead of the trustees would result in a part of the profits escaping taxation because the expenditure by the trustees would include inadmissible deductions And finally it must not be forgotten that the taxation of trustees other than those referred to in Chapter V is regulated entirely by section 3 See *Williams* v *Singer* cited *supra* and *Fry* v *Shiel's Trustees*[4] and the case set out under section 3 and also the *Hotz Trust case*

In this respect, *viz*, whether tax should be levied on the trustee or on the beneficiary, and how far the liability of one depends on that of the other, it is submitted that there is no material difference between the provisions of the United Kingdom

(4) 6 Tax Cases 583

Income tax law and those of the Indian Income tax law In either country the Income tax Act provides expressly for the taxation, in certain specified circumstances, of the trustee as such, as a distinct person from him as an individual, and it is submitted that the general principles underlying the decisions and the dicta in the United Kingdom cases will apply to India also Due regard should, of course, be paid to the differences between the English law and the Indian law governing trusts, the vesting of estate in legatees, etc It must obviously depend on the nature of each trust and the facts of each case whether the trustee or the beneficiary should be taxed

In the case of the *Hotz trust*, the trustees carried on business and administered the properties of the testatrix for the benefit of her children, all of whom were of full capacity and ordinarily resident in British India The trustees had to keep proper accounts and get them audited They had to set aside a part of the profits every year as a reserve for business purposes, and this reserve, if not utilised in the business, was to be divided among the beneficiaries at the end of ten years and thereafter periodically according to circumstances The trustees could extend the business at their discretion and could borrow for this purpose Half the profits was to be earmarked for the purpose of repaying such loans No beneficiary could hypothecate or alienate his or her share except by selling it equally to all the other beneficiaries *Held*, that the trustees should be taxed on the profits of the business, as an association of individuals[5]

In *Commissioners of Inland Revenue* v *Pakenham, Commissioners of Inland Revenue* v *Countess of Longford*[6] it was held that the income tax provisions relating to representative assessments on trustees and guardians are not applicable to super tax since the latter is a tax on 'total income'—unlike income tax which is separately assessed on separate schedules and is therefore assessed on the trustee in respect of the property under his control The trustee may not be in a position to return the 'total income' of the ward and if even he was he may not be able to indemnify himself In view of the words "so far as they are applicable"—not *mutatis mutandis*—the House of Lords considered that in view of the injustice that would otherwise result, representative assessments could not be made on trustees on account of super tax This ruling will not apply to India since here the scheme of the Act is different Both super tax and income tax are taxed on the basis of the same total income The

(5) *Hotz Trust* v *Commissioner of Income ax Punjab* 11 Lah 724
(6) 7 A T C 111, 13 Tax Cases 573

difficulty, however, about returning 'total income' remains and this is an argument for taxing beneficiaries instead of trustees, wherever possible.

Trustee—Correcting mistakes—

Under a will, several annuities were directed to be given free of deduction. The trustees had paid the annuities for some years without deducting income-tax. It was held that the annuities were not free of income-tax, and that the trustees were entitled to deduct the income-tax they had paid out of residue from future payments of annuities on the ground that the Court will always, when possible, allow the correction of errors of account as between trustees and their *cestui que trust*. The rule that a man cannot recover moneys paid under a mistake in law does not apply to cases of this kind. See In re *Musgrave; Machell* v. *Parry*.[7] In India such annuities cannot be taxed at source—see notes under sections 7 and 12; but the main principle of this decision, regarding the right of a trustee to correct past mistakes on account of income-tax, will presumably apply in India also.

Agent of non-resident—Liability personal—

The liability of an agent of a non-resident to pay tax is personal. See *Plunkett* v. *Narayan Parasuram*.[8] That case though decided under the 1886 Act, is still applicable. The only change since made in the law is that the agent should be served with a notice (*see* section 43) and given an opportunity to show cause why he should not be treated as an agent. The fact that the liability of the agent is personal does not affect the right of the agent to recoup himself from his principal. All that the personal liability means is that the Crown does not look beyond the agent for the recovery of tax. The agent is indemnified under section 65 of the Act.

Courts of Wards, etc

41. *In the case of income, profits or gains chargeable* under this Act which are received by the Courts of Wards, the Administrators-General, the Official Trustees or by any receiver or manager (including any person whatever his designation who in fact manages property on behalf of another) appointed by or under any order of a Court, the tax shall be levied upon and recoverable from such Court of Wards,

(7) (1916) 2 Ch. 417.
(8) 1 I. T. C. 1.

Administrator-General, Official Trustee receiver or manager in the like manner and to the same amounts as it would be leviable upon and recoverable from any person on whose behalf such income, profits or gains are received, and all the provisions of this Act shall apply accordingly

History—

This section is the same as section 32 of the 1918 Act except for the addition of the words 'profits and gains , and corresponds to sections 22 and 23 of the 1886 Act

Indemnity—

The persons mentioned under this section have the benefit of the indemnity in section 65 Section 23 of the 1886 Act specifically authorised such persons to retain the tax but this provision has been omitted in the later Acts

Nature of liability—

This section merely authorises the collection of taxes through Receivers, etc, and does not fully answer the question of the Receiver's liability in case he distributes the assets without paying income tax or some other debt due to the Crown The answer to that question depends on how far the Crown has any priority of claim in such cases in India. In this connection, *see* notes under section 46 What section 41 does is to render liquidators, etc, liable to tax for and on behalf of the persons who are beneficial owners That is to say, if there was an antecedent claim from the Crown for income tax which arose before the liquidation, and the liquidator paid away the assets without retaining the debt due to the Crown his liability would depend upon the view taken as to *the applicability in India of the English doctrine* of priority of Crown debts but if the claim for the tax arose during the liquidation then the liquidator would in any view be personally liable if he paid away the assets without retaining the tax

Limit of liability—

The extent to which guardians, etc under section 40 and Receivers and others under this section are liable is evidently limited to the assets that come into their hands It would be obviously inequitable to hold a Receiver personally responsible for anything more than what he actually received At the same time, it is evidently the duty of a Receiver not to pay away all the assets when he is in a position to know that the estate is

liable to pay tax If he so pays away the assets he would evidently be personally liable for the tax, and could not restrict his liability to the balance of the assets in his hands

42 (1) In the case of any person residing out of British India, all profits or gains accruing or arising to such person, whether directly or indirectly, through or from any business connection or property in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be for all the purposes of this Act, the assessee in respect of such income-tax

Non resident

Provided that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person which are, or may at any time come, within British India.

(2) Where a person not resident in British India, and not being a British subject or a firm or company constituted within His Majesty's dominions or a branch thereof, carries on business with a person resident in British India, and it appears to the Income-tax Officer or the Assistant Commissioner, as the case may be, that owing to the close connection between the resident and the non-resident person and to the substantial control exercised by the non-resident over the resident, the course of business between those persons is so arranged, that the business done by the resident in pursuance of his connection with the non-resident produces to the resident either no profits or less than the ordinary profits which might be expected to arise in that business the profits derived therefrom or which may reasonably be deemed to have been derived therefrom, shall be chargeable to income tax in the name of the resident person who shall be deemed

to be, for all the purposes of this Act, the assessee in respect of such income-tax

(3) Where any profits or gains have accrued or arisen to any person directly or indirectly from the sale in British India by him or by any agency or branch on his behalf of any merchandise exported to British India by him or any agency or branch on his behalf from any place outside British India, the profits or gains shall be deemed to have accrued and arisen and to have been received in British India and no allowance shall be made under sub-section (2) of section 10 in respect of any buying or other commission whatsoever not actually paid, or of any other amounts not actually spent for the purpose of earning such profits or gains

Rule 33—In any case in which the Income tax Officer is of opinion that the actual amount of the income, profits or gains accruing or arising to any person residing out of British India whether directly or indirectly through or from any business connection in British India cannot be ascertained, the amount of such income, profits or gains for the purposes of assessment to income tax may be calculated on such percentage of the turnover so accruing or arising as the Income tax Officer may consider to be reasonable, or on an amount which bears the same proportion to the total profits of the business of such person (such profits being computed in accordance with the provisions of the Indian Income tax Act) as the receipts so accruing or arising bear to the total receipts of the business, or in such other manner as the Income tax Officer may deem suitable

Rule 34—The profits derived from any business carried on in the manner referred to in section 42 (2) of the Act may be *determined for the purposes of assessment to income-tax according* to the preceding rule

History—

The first two sub sections of this section were first introduced in the 1918 Act, and were probably influenced by the alterations in the English law in 1915 The only change made in 1922 was the addition of the words 'or property' after the words 'business connection' in section 42 (1) In 1928, sub section (3) was added This sub section gets over the dictum of the Rangoon

High Court in *Steel Brothers' case*[9] that in computing profits in such cases a notional commission should be deducted

Meaning of words—

Residing—As to what constitutes 'residence,' *see* notes under section 4 (2)

Accruing or arising—As to the meaning of these words, *see* notes under section 4 (1). While the general tendency of the Act is to use the words 'accrue and arise' with reference to the origin of the income, this section clearly uses the words with reference to the idea of receivability Since the first sub-section deems the income, profits, etc, in question to accrue or arise in British India, the income *ex hypothesi* accrues or arises outside British India The origin of the income being, according to the sub section, business connection or property in British India, accruing outside British India can only mean being receivable outside British India

Directly or indirectly, through or from—So many alternatives appear in this collocation so as to cast the net as wide as possible

Business connection—*See* decisions set out below

Property in this section is arguably not used in the same sense as in section 9, but in its wide sense of including other sources of income as well *See* notes under section 4 (3) (i) as to the meaning of this word See also *Curtis Brown, Ltd* v *Jarvis*,[10] in which Rowlatt, J, held that 'property' included copyright But it has been suggested in the *Hongkong Trust Co's case*[11] by the Bombay High Court that the word is used here in the restricted sense of section 9 The only practical difference following from either construction is the inclusion, in the one case, and the exclusion in the other of income from 'other sources', *e g*, royalties, interest on Bank deposits or other loans, annuities other than by employers, every other source of income is automatically provided for even in the restricted construction because the tax is deducted at source in respect of income from Salaries and Securities and taxed at source on dividends As regards professional earnings, cases of non residents earning professional income in British India, though conceivable, are not very common

(9) 2 I T C. 119
(10) 8 \ T C 466
(11) 3 I T C 135

Agent—It will be seen from section 43 that the agent of a non resident will include persons treated as such by the Income-tax Officer

Not being a British subject or a firm or company, etc—The object of this provision is not clear The manipulation of business so as to produce no profits or less than the ordinary profits is as possible in the case of non residents who are British subjects or firms or companies constituted within the British Empire as in the case of other non residents or firms or companies The provision has evidently been bodily copied out from the corresponding provision in the English Income tax law

British subject—Under section 2 (*a*) of the Indian Naturalisation Act, 'British subject' means a British subject as defined under section 23 of the British Nationality and Status of Aliens Act, 1914 The latter definition is as below

"A person who is a natural born British subject or a person to whom a certificate of naturalisation has been granted or a person who has become a subject of His Majesty by reason of any annexation of territory "

Should agent be in receipt of profits—

It will be seen that, while sections 40 and 41 require the trustee, agent or receiver to be in receipt of the profits, section 42 does not require the agent to be in actual receipt of the profits Section 42 (1) seeks to catch profits that accrue or arise outside British India from a business connection in British India and are normally received outside British India, *ex hypothesi* the agent in British India could not be in receipt of the profits Similarly section 42 (2) seeks to catch profits that actually accrue or arise—but are not necessarily received—in British India, but are concealed by the manipulation of transactions between the non resident principal and the resident agent In such cases the profits are more likely to be received by the non resident principal abroad than by the resident dummy agent in British India That is why the sub section does not require the agent to be in actual receipt of the profits In either case, *i e* under sub section (1) as well as sub section (2) of section 42, the agent would have to recoup himself somehow from the moneys in his hand belonging to his non resident principal But in cases falling under section 42 (1), the Income tax Officer may recover the tax direct from the assets, in British India, of the non resident principal. In cases falling under section 42 (2), the agent is really a creature of the non resident, and no special provision is necessary to enable him to recover the tax from his principal

See notes under section 43 as to whether the resident agent should be in receipt of profits

His Majesty's Dominions—

There is no general definition of "His Majesty's Dominions" and the special definition that has been given, for instance in the Government Trading Taxation Act, will evidently not apply outside that Act From the definitions given in the General Clauses Act of the expressions 'India' and 'British India' it would seem that 'His Majesty's Dominions' as used in this section do not include Indian States

Computation of taxable profits—

The receipts in the hands of the local agent in cases falling under sub section (1) will be ordinarily gross profits, the computation of taxable profits should be made under Chapter III, and if that is not possible under Rules 33 and 34 Rule 33 is necessary because the actual records of profits received by non residents through trading in this country are, generally speaking, not available, and there must therefore be some arbitrary method by which such profits can be ascertained Similarly, Rule 34 is necessary because *ex hypothesi* in cases in which as the result of artificial manipulation the true profits have been obscured, it is possible to ascertain the profits only by some arbitrary method

Non-residents—Income other than from business—

Under section 4 (1) tax is payable in respect of all income, profits or gains accruing or arising in British India or deemed under the provisions of the Act to accrue or arise or to be received in British India whether the recipient resides in British India or not There is little difficulty regarding income arising in British India and receivable by non residents under the heads "salaries" "interest on securities" "property" "professional earnings", or "other sources" In cases of income from "interest on securities" and "salaries", income-tax is deducted at the source and in the case of income under the other heads a non resident is usually represented by an agent [section 42 (1)] No difficulty has been experienced in determining whether income under any of those heads is taxable (*Income tax Manual*, para 86)

Non-residents—Income arising from business in India—

There is no precise definition in the Act which can be used as a test for determining in every particular instance whether a non resident is or is not carrying on business in British India and how the amount of taxable profits is to be arrived at Section 42 of the Act contains special provisions regarding non residents and rules 33 to 35 prescribe the manner in which and the procedure by which the income profits and gains may be arrived at in the case of non residents Instances are given below of the method to be adopted in dealing with typical cases

(1) *Indian branches of non resident firms* are liable to assessment under the Act In order to secure an accurate assessment in such cases, sections 22 (4) and 37 enable an Income tax Officer to require the production of the balance sheet and profit and loss account of the firm as a whole, in addition to that of the Indian branch, and also to require the submission of a detailed statement of all the profits credited to the personal account of the head office on account of transactions carried out on its behalf In some instances however, the form adopted for the accounts and balance sheets of the head office or the Indian branch does not enable the share of profits properly due to the Indian branch to be accurately gauged, while there are certain firms which keep no accounts at all either at their head office abroad or at their branch offices in India Rule 33 gives Income tax Officers wide powers to determine how the profits of the Indian branch shall in these circumstances be calculated and enables them to fix as the income of the Indian branch for assessment purposes either a percentage of the turnover of the business done by the branch or, where this procedure proves unsuitable an amount which bears the same proportion to the total profits of the business as the Indian receipts bear to the total receipts of the business or where neither of the above methods proves suitable any other more reliable method of calculation In the case of shipping companies in particular the most suitable method of assessing the Indian branch is usually to calculate tax on the same proportion of the total profits of the company as the Indian receipts of the company (meaning thereby the sums received either in India or elsewhere on account of goods shipped or passengers carried from India) bear to its total receipts In the special case of the Indian branches of non resident insurance companies (life marine fire accident, burglary fidelity guarantee etc) it will probably be found both feasible and equitable to adopt the provisions of rule 35 and assess these branches on the proportion of the total profits of the companies corresponding to the proportion which their Indian premium income bears to their total premium income

(2) *Indian firms allied to non-resident firms of which they are not, technically, either branches or agencies* often succeeded in the past in escaping their proper taxation by a manipulation of accounts with the parent non resident companies To cite an example a foreign firm dealing in aniline dyes was registered as a separate limited liability company in India with a capital of Rs 20 000 The shares were never placed on the market in India but with the exception of small holdings by managers in India were all held abroad The registered capital was nominal in comparison with the value of the stock in trade and the parent company abroad sold to the subsidiary Indian company at a price leaving a margin just sufficient to cover the expenses of the subsidiary company, or causing an actual loss to be shown Section 42 (2) of the Act is designed to prevent a subsidiary Indian firm or company from benefiting by such a manipulation and enables an Income tax Officer to assess it on the profits which may reasonably be deemed to have been derived from its Indian business while where any difficulty is experienced in arriving at a basis for assessment, assessment on a percentage of turn

over, or other suitable method can be adopted under rule 34 It is to be noted that the provisions of section 42 (2) are not applicable where the parent non resident firm or company is constituted within the British Empire and that the liability to assessment is placed on the subsidiary Indian firm as a principal and not as an agent

(3) *Indian agents of non-resident firms of which they are not technically either branches or subsidiary firms* are liable for the payment, on account of their principals, of the tax on their principals' Indian profits under the provisions of sections 42 (1) and 43 of the Act It will be observed that these provisions permit the levy of the tax on a non resident's business not only where he has established a regular *agency* in India but also where he conducts his business regularly through a particular *agent* or casually through various *agents* In this case, it is not necessary that anything of the nature of a regular *agency* should exist in order to make the profits of a non resident chargeable in the name of an agent They are so chargeable even when the only connection between the non resident and the person acting as his agent is that that person is ordinarily and regularly employed as an agent by the non resident The Government of India do not, however, desire that in practice the liability to assessment should be enforced except where something definitely of the nature of an agency exists and in particular no attempt should be made to tax the profits of a *consignment business pure and simple,* merely because the non resident consignor habitually uses a particular resident as his agent

In all cases, it will be a question of fact whether the connection between the non resident and the resident is such that an agency can be held to exist Agency' for the purposes of this section should be interpreted to mean a regular, not casual agent and one whose relation to the non resident principal is such that the principal may reasonably be held to be trading *in* the country and not merely with the country If for example there is no privity of contract between a foreign principal and a resident who purchases the foreign principal's products through another resident, or if the resident vendor has to bear any bad debts arising out of such transactions, the resident vendor is not to be treated as the agent of the non resident Even if a non resident does not bear bad debts he will be considered to be trading *in* the country (if there is privity of contract) if the agent receives a *del credere* commission, *i e*, an additional commission in consideration of guaranteeing the non resident against bad debts, or if the rate of commission is so unusually high as evidently to be intended to include a *del credere* commission though none is specifically mentioned It is doubtful whether it is practicable to formulate for the guidance of Income tax Officers any more definite principles than those stated above, but the following examples may serve to indicate the lines on which decisions should be reached —

(*a*) *B*, a distiller in Glasgow, has agreed to sell to no one in India except *A*, his agent, provided that *A* gives *B* all or an agreed proportion of his trade *A* purchases from *B* and sells to the trade at his own rates, and all bad debts are *A's* No attempt should be made to

tax *B* on his profits His position in spite of his supplementary agreement with *A*, is merely that of a seller to an Indian consignee who takes the risks or profits of the trade in India

(*b*) *A*, an Indian resident and a large supplier of mill stores, has a monopoly for the sale in India of the belting of a non resident *B* *A* is paid commission by *B* on all orders he sends either for his own stock or risk or in execution of orders obtained He does not confine his purchases of belting to *B* He stands all loss from bad debts and fixes the prices to be asked for the goods Here again the position of *B* is merely that of a seller to an Indian consignee and no attempt should be made to tax *B's* profits

(*c*) *A* is the Indian agent for hardware and sundries of *B*, a British manufacturer *A* receives salary and commission from *B* and bad debts fall on *B* Here there is a regular agency, and *B's* Indian profits should be taxed through *A*

(*d*) *A* is the Indian agent for *B*, a firm in an Indian State, who consigns goods for sale in Bombay or China through *A* The business is purely a consignment business and *B's* profits on his Indian trade should not be taxed

In all these cases *A's* remuneration or profits as agent are liable to the tax

(4) *Casual agents for non resident firms to whom goods are from time to time consigned* have been dealt with in (3) above and no attempt should be made to tax the profits of a non resident through the agent on this class of business

Attention is invited to the ruling of the Madras High Court (Case of *Bhanjee Ramjee & Co*)[12] in which it has been held that a person who is not a resident in British India but to whom income arises or accrues through business connections in British India is assessable to income tax under sections 4 and 42 (1) of the Act whether he is a British subject or a foreigner and that the provision in the latter section that such income shall be taxable in the name of the agent of any such person does not mean that it is not chargeable unless assessed in the name of an agent It will be clear from section 42 (3) that the entire profits of a branch or agency of a foreign firm importing goods into British India are liable to tax in British India irrespective of where the profits accrued or arose and whether received in British India or not Thus if a foreign manufacturer has an agency or branch in British India and sells his products through it in British India he is liable to tax on his manufacturing profits as well as on the merchanting profits—while a foreign head office is not allowed to charge a notional commission to its branch or agency in British India on goods exported to the branch or agency and sold by it in British India

If it is desired to assess a non resident who has no resident agent through whom such assessment can be made and whose entire income also cannot be taxed at source or indirectly a notice under section 22 (2)

(12) 1 I T C 14?

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If it is desired to assess a non resident who has no resident agent through whom such assessment can be made and whose entire income also cannot be taxed at source or indirectly, a notice under section 22 (2)

(12) 1 I T C 147

should be served upon him as early as possible in the year by registered post (acknowledgment due) allowing plenty of time for the return to be made If he then fails to make a return, or to comply with subsequent notices calling for the production of accounts etc (in which also ample time should be allowed for compliance), an assessment may be made under section 23 (4) When serving such notices on a non resident he should be invited in a covering letter to appoint an agent to represent him for income tax purposes in India

A person whom the Income tax Officer has decided, after due notice and hearing under section 43, to treat as the agent of a non resident is not entitled to appeal to the Assistant Commissioner against the Income tax Officer's order until an assessment has been made But it is open to such person to petition to the Commissioner of Income-tax against the Income tax Officer's order before an assessment is made, and Commissioners of Income tax are authorised to dispose of such petitions under section 33 of the Act

See also *paragraph 91*[13] as to the time within which arrears of tax due from a non resident may be recovered (*Income tax Manual,* para 87)

Depreciation—Foreign Shipping—

The following instructions should be followed in regard to the treatment of depreciation in assessing shipping companies the whole of whose profits or gains neither accrue nor arise nor are received in India —

If a company furnishes annual accounts for the whole of its business Indian and foreign the second method provided by Rule 33 should be applied Depreciation has only to be considered in calculating the world profits These are to be calculated according to the Indian Income tax Act Profits calculated according to the United Kingdom Act will therefore, require certain adjustments Deductions permitted in the United Kingdom but not permitted in India will have to be added back and deductions permissible in India but not permissible in the United Kingdom will have to be allowed If any company however prefers to claim the depreciation allowed by the United Kingdom Income tax authorities the Commissioners of Income tax may adopt that figure Otherwise depreciation will have to be calculated according to the Indian rules What follows applies to the calculation of depreciation according to the Indian rules For this purpose a complete depreciation record has to be maintained for the entire fleet Depreciation begins to run from the first year in which the Company is "assessed" in India, that is, the first year in which its profits (or loss) were determined for the purpose of deciding whether it was liable to Indian income tax Unabsorbed depreciation *i e*, any balance of depreciation which cannot be allowed in any year owing to the profits not sufficing to cover the full amount permissible under the Indian rules will be carried forward and allowed as far as possible in calculating the world profits according to the Indian

(13) Cited under section 46

method in the following year and if necessary in subsequent years What has been said above about depreciation applies equally to obsolescence

The proportion $\frac{\text{Indian receipts}}{\text{total receipts}}$ is applied to the world profits calculated according to the Indian method (if there are any such profits) and the result is the Indian income liable to tax. No further deduction is permissible from the amount thus arrived at on account of depreciation (unabsorbed or otherwise) or anything else The due proportion of all allowances permissible is automatically set off against the Indian profits by the above method

This method is equally applicable whether a Company works out the profits for each voyage or follows any other method of accounting provided that it prepares complete annual accounts for the *whole* business, Indian and foreign, and furnishes the accounts of gross receipts, Indian and foreign

Some lines do not furnish complete annual accounts for their world business They keep separate complete annual accounts for their Indian trade—that is for all "round voyages" to and from Indian ports The proper course is then to apply the method just described treating the profits of the Indian trade and the gross receipts of the Indian trade as though they were the "world profits" and the "world receipts" respectively In fact the business other than the Indian trade is ignored

A difficulty sometimes arises in such cases owing to the fact that the ships employed in the Indian trade are constantly being changed Unless United Kingdom depreciation is accepted as indicated above a depreciation record will have to be kept for every ship employed at any time in the Indian trade Depreciation must be allowed on each ship employed in the Indian trade in a given year and the allowance must be a proportion of the annual rate calculated with reference to the number of days spent in the Indian trade whether at sea or in harbour Any unabsorbed depreciation in any year must be distributed among the ships in the Indian trade in that year in proportion to the capital cost of each, and the unabsorbed depreciation thus allotted to any ship can only be allowed in any subsequent year against the *same ship*

The allowance should cease —

(a) on ships included in the fleet in the first year in which the Company becomes *liable* to assessment in India (irrespective of whether it was *actually* found to have a taxable income in that year or not), after the twentieth year beginning with that year

(b) on ships subsequently added to the Company's fleet after they have been borne on the fleet for 20 years.

In both cases the period may be extended proportionately where the United Kingdom depreciation is allowed in calculating the 'profits of the Indian trade" which take the place as already explained of the "world profits" in case (1)

Obsolescence cannot be allowed in these cases. (*Income tax Manual*, para 88)

When assessing British Shipping Companies, the Income tax Officers should accept a certificate granted by the Chief Inspector of Taxes in the United Kingdom stating (1) the ratio of the profits of any accounting period as computed for the purposes of the United Kingdom income tax to the gross earnings of the Company's whole fleet, or (2) the fact that there were no such profits The expression 'gross earnings of the Company's whole fleet' means the total receipts of the Shipping Company, excepting only receipts from non trading sources, such as income from investments The following instructions should be observed where British Shipping Companies correspond direct with Income tax Officers and not through an Agent in British India —

(1) Where a British Shipping Company which corresponds direct with an Income tax Officer is unable to furnish its return of income by the prescribed date it will obtain an extension of time from the Income tax Officer but every effort should be made to file the return as early as possible

(2) The Income tax Officer will make the assessment as soon as possible after receiving the return and in any case within one month

(3) The notice of demand will be issued on the shipping company's agent in accordance with the provisions of the Income tax Act, and a copy of the assessment order will be sent to the company direct The company will arrange with its agent for the despatch to it of the notice of demand

(4) Provided that the notice of demand can be issued on or before January 15th the period allowed for payment will be sixty days It the demand is made after January 15th, the period will be shorter

(5) For the purpose of sub section (2) of section 30 of the Indian Income tax Act, 1922, the Assistant Commissioner will regard it as a proper extension of time to allow the shipping company to file an appeal up to the date on which a reply could be received from England if that reply were despatched by the mail in the week following that in which the notice of demand and the copy of the assessment order reached or could be presumed to have reached, the company

(6) The demand must be met within due date unless the Income tax Officer agrees to give the agent further time for payment But in any case the demand must be paid before the end of the financial year If a demand has been paid before the decision of an appeal where one has been filed and the appeal results in a reduction of the assessment, a refund will promptly be granted in the ordinary course (*Income tax Manual*, para 89)

Non-resident—Business connection—When taxable—Whether section 42 (1) machinery section—

In *Board of Revenue* v *Madras Export Company*[14] a firm which had its headquarters in Paris purchased hides and skins in British India on the orders of constituents in various parts of

(14) 1 I T C 194

Europe and America The profit of the firm consisted of the commission received on the sales The skins were bought in British India for the firm by an agency called the Madras Export Company, which was resident in Madras This company bought the material at the lowest prices possible, subject, however, to a maximum fixed by the firm in Paris The materials were shipped in the raw state as purchased The Madras Export Company made no profits on the sales of the skins, and no part of the profits of the firm in Paris were remitted to Madras The Madras Export Company received from the Paris firm the necessary funds for purchases from time to time *Held*, by the Madras High Court, that the Madras Export Company was not assessable, section 33 (1) of the Income tax Act, 1918 (section 42 (1) of the present Act) being a machinery section only and not a charging section But this decision has not been followed by other High Courts, see *Rogers Pyatt Shellac case* and *Steel Brothers' case* cited *infra*

The Rogers Pyatt Shellac Company was incorporated in the United States of America with its headquarters in the City of New York The Company had a branch office in Calcutta to buy gum, shellac and other Indian products, and a factory at Wyndhamgunj in the United Provinces in which the raw produce purchased locally was worked into a form suitable for export No sales were conducted in India by the Company their transactions were limited to the purchase of shellac and other goods, some of which were purchased on account of a Gramophone Company which paid the Company a fixed percentage on the purchase *plus* expense, while the balance was sold in the open market *Held*, that the profits arising out of the transactions were taxable

Chatterjee, J (with whom Chotzner, J concurred) considered that "business connection" used in section 42 (1) meant the same as "business" and that the assessee who had a factory carried on "business" in British India, business according to the definition *in section 2 (4) including manufacture and concerns* in the nature of manufacture He opined that no guidance could be had from the decision of the House of Lords in *Smidth* v *Greenwood*[15] since the section in the United Kingdom Acts [corresponding to section 43 (1)] with reference to which that case was decided did not contain any words corresponding to the words "shall be deemed to be income accruing or arising within British India" which occur in section 42 (1) of the Indian Act

(15) (192-) 1 A C 417

This point had been overlooked by the Madras High Court in *Board of Revenue* v *Madras Export Co*[16]

While observing that the scope of section 42 (1) extended the territorial limits of taxation beyond what had been recognised as proper limits both in England and, before 1918, in British India, Chatterjee, J, held that as section 42 (1) stood there was no escape from the conclusion that the profits in question were taxable Mukerji, J, agreed as regards the difference between the United Kingdom law and the Indian law, and the consequent inapplicability of the decision in *Smidth* v *Greenwood*[17], which the Madras High Court followed in the *Madras Export Company's case*[16] But he adopted a slightly different line of reasoning as regards "business connection" He thought that income from business connection might either be a species of income from business or income from "other sources", and in either case it meant such part of the income as may be calculated to have been made as representing that part of the income of the non resident which is attributable to the connection he has with a business in British India[18]

A company registered in England with its headquarters in London and admitted by the Crown to be a non resident of British India, carried on business operations in Burma, especially in rice, timber and cotton It exported the goods partly in their raw state and partly after subjecting them to some process of conversion in their mills The company contended that none of the profits arising from the export of goods from Burma which were sold in England should be assessed to income tax *Held*—

(i) following the *Rogers Pyatt case*[17] and differing from the *Madras Export Company's case*[16] that section 42 (1) is a charging section and not merely a machinery section,

(ii) following *Commissioners of Taxation* v *Kirk*[19] that in determining whether any income arises or accrues in British India one must look not only at the last stage of the accrual but also take into consideration the previous stages,

(iii) that no distinction so far as liability to income tax is concerned can be drawn between profits on produce which has undergone a process of conversion or 'working up' in British India and profits on produce purchased by the assessee in British India and exported in the same form as when purchased,

(16) 1 I T C 194
(17) (1922) 1 A C 417
(18) *Rogers Pyatt Shellac & Co* v *Secretary of State* 1 I T C 363
(19) (1900) A C 588

(*iv*) that in calculating the net profits though due deductions had been made by the Commissioner in respect of the cost of the Home establishment, this deduction was not sufficient; and that a further deduction should be made on account of the commission that would have been paid if the work at London had been done by a commission agent instead of by the Head Office; and

(*v*) that profits arising on contracts of insurance entered into by the Head Office on rice cargoes consigned to it by the Rangoon branch did not accrue or arise from business connection with or in British India, inasmuch as the profits were not merely earned in England but the contracts were entered into in England.[20]

Item (*iv*) in the above ruling has become obsolute in view of sub-section (3) added to this section by Act III of 1928.

A non resident lending money to residents in British India derives income accruing to him from business connection in British India.[20a] If the main business of the non-resident is that of lending money, *e g*, the case of a finance company, the income accrues not merely from business connection but from business in British India In other cases it might arise from 'Other sources' as in the case of fixed deposits with banks or similar concerns in British India.[20b]

Non-residents—May be taxed direct—If accessible—

"It makes no difference with regard to this section [33 (1) of the 1918 Act, corresponding to present section 42 (1)] whether the non-resident entitled to the income is a British subject or a foreigner, in either case he is chargeable with the tax in British India It has, however, been argued that because section 33 (1) not only provides that such profits and gains shall be deemed to be income accruing or arising within British India, but goes on to provide that they "shall be chargeable to income tax in the name of the agent of any such person, and such agent shall be deemed to be the assessee in respect of such income tax", the profits and gains in question are not chargeable unless they are assessed to income tax in the name of an agent of the non-resident This construction is not supported by the proviso immediately following which supports the construction that the profits or gains are chargeable if they can be got at in British India whether they are assessed in the name of an agent of the non resident or not. This was expressly decided on the corresponding section of the English Act by Mathew and

(20) *Steel Brothers v Commissioner of Income tax, Burma*, 2 I T C 119

(20a) *Commissioner of Income-tax, Bombay v Bombay Trust Corporation*, 57 I A 49 54 Bom 216 58 M L J 197 (P C)

(20b) *Bombay Trust Corporation v Commissioner of Income tax, Bombay*, 3 I T C 135.

A L Smith, JJ in *Tischler* v *Apthorpe*[21] which was approved by the Court of Appeal in *Werle & Co* v *Colquhoun*,[22] and it was held that a non resident, who had been himself assessed whilst in England had been properly assessed All that the latter part of the section does is to provide machinery by which the tax can be levied where the non resident cannot himself be got at

"In the present case the petitioner resides and has his principal place of business in the Cochin State in Mattancherri which adjoins British Cochin and practically forms one town with it, and the petitioner not only does a large part of his business in British Cochin as stated in the reference but also accepted notices and submitted the necessary returns to the Collector of Malabar of which British Cochin forms a part for income tax purposes The reference states that 'Contracts for the supply of goods are entered into and signed at the offices of firms in British Cochin and the goods are delivered at the jetties of the purchasers the sale proceeds are paid to the firm s agent or other duly authorized servant in cash in British India or by cheques which are cashed in Banks in British India "

In these circumstances it seems clear that these are profits and gains arising to the petitioner through or from his business connections in British India in respect of which he is assessable under the Act "[23]

The decision in *Tischler* v *Apthorpe*[24] above referred to was indirectly approved by the House of Lords in *Whitney* v *Commissioners of Inland Revenue*,[25] where it was said that the agency provisions in the English Acts (which correspond to the Indian provisions—but *see* notes *ante*, as regards the difference) were mere aids to getting at the principal and enforcing his liability In *Maclaine* v *Eccott*[26] the House of Lords held that the foreign principal would be liable even if the agent was not

Business connection—Meaning of—

Per Wallace J in *Board of Revenue* v *Madras Export Co*[27] "Such income is only chargeable when it is 'Income derived from business' by force of section 5 (corresponding to present section 6) The phrase in section 5 is not 'Income derived from or through any business connection' At one stage the Government Pleader contended that such a phrase might be implied under sub section (vi) of section 5—'income derived from other sources' but such a contention violently contravenes the principle that taxation must be imposed by express words "

(21) 2 Tax Cases 89
(22) 2 Tax Cases 402
(23) *Chief Commissioner of Income tax* v *Bhanjee Ramjee & Co* 1 I T C 147
(24) 2 Tax Cases 89
(25) 10 Tax Cases 88
(26) 10 Tax Cases 481
(27) 1 I T C 194

Per *Chatterjee, J* —"If by the expression 'business connection' in section 33 (1) was meant something different from 'business' in section 5 then it would be going beyond the 'classes of income' which alone according to section 5 are chargeable to income tax Section 6 of Act XI of 1922 uses the word 'heads' instead of 'classes' The former expression seems to have been substituted, to make it more comprehensive, we think the same thing was meant by the two expressions 'business' and 'business connection' and for this reason Even if section 33 (1) be taken as a 'machinery' section, as contended on behalf of the Company, the agent cannot be charged with income tax, nor can the agent be deemed the assessee in respect of the income tax unless the principal is chargeable The principal is chargeable with tax upon income from 'business', and unless the expression 'business connection' in section 33 (1) was used in the same sense as 'business' in section 5, the principal cannot be charged, and *a fortiori* the agent cannot be charged with the tax The section accordingly even as a machinery section would be useless The English Finance Act (No 2) of 1915, section 31 (2) uses the words 'through or from any branch factorship, agency, receivership or management,' and the comprehensive expression 'business connection' was probably used in the Indian Act to cover all those words Then it is pointed out that the word 'property in section 42 (1) (which was not in the previous Act VII of 1918) indicates that the section could not be a 'machinery' section It is contended that the profits of 'property' in British India must accrue or arise in British India and the fact that the profits of 'property' also shall, in some cases, be deemed to be profits accruing or arising in British India indicates that the section was merely intended to provide for the method in which the tax was to be realised

"The word 'property' seems to have been taken from the English Act, though the expression does not appear to have been considered in the English cases cited above It is possible to conceive of cases where a property may be situate in British India and the profits thereof may accrue or arise out of British India '[28]

Per *Mukerji, J* —"This brings us to the next question as to what *is meant by 'business connection'? By section 4 of the Act 'income* derived from business' is liable to tax It has been argued that unless the income which is now sought to be charged amounts to income derived from business, it would not be chargeable under section 3 (1), and that section 33 (1) by enacting that profits and gains accruing or arising directly or indirectly through or from business connection with British India professes to make something chargeable which is not chargeable under section 3 read with section 5 The answer to this argument however is that section 5, cl (vi) includes 'income from all other sources' and by section 11 'income derived from all other sources' include income and profits of every kind and from every source to which the Act applies if not included under any of the preceding heads, i e, (i) to (v) But even if it be argued that 'income derived from all other sources' may

(28) *Rogers Pyatt Shellac & Co v Secretary of State*, 1 I T C. 363

not refer to income of this description—a question, with regard to which I do not wish to pronounce any definite opinion, I do not see why 'profits and gains from business connection' should not be included in the general expression 'income derived from business' which is used in section 5 The expression, it must be admitted, is dangerously vague and it is much to be regretted that in a fiscal enactment a more precise expression has not been used The meaning, however, does not admit of much doubt, for the context shows that it is such gains or profits as may be calculated to have been made as being that part of the income of the non resident which is attributable to the connection he has with a business in British India The word 'business' is one of large and indefinite import and connotes something which occupies the attention and labour of a person for the purpose of profit The word means almost anything which is an occupation or a duty requiring attention as distinguished from sport or pleasure, and is used in the sense of an occupation continuously carried on for the purpose of profits [29] A concern by reason of which one can be said to have connection with such an occupation is business connection ' [30]

" We admit the difficulty arising from the vague expression 'from any business connection' Taken in its wide sense, it would render liable to Indian income tax any profits made by a manufacturer in England on a single consignment of goods to an importer in India This is the meaning which the Commissioner of Income tax seems to have attached to the phrase, and is the meaning which, the learned Government Advocate contends, is the correct one It is one however which we cannot adopt, as such a meaning would be repugnant to the word 'business' in section 6, as defined by section 2 (4), and we can assign no wider meaning to it than the latter words of the definition as 'any adventure or concern in the nature of trade, commerce or manufacture' It was probably used, as Mr Justice Chatterjee conjecture as a compendious expression to cover such concerns in the nature of trade, commerce, or manufacture as arise through a branch, factorship, agency, receivership or management " (*Steel Brothers' case* [31]

Another way of explaining "business connection' on the lines of the hypothesis suggested by Chatterjee, J, in *Rogers Pyatt Shellac case*[30] and Rutledge, C J, in *Steel Brothers' case*[31] is as follows —

Though it is a question of fact whether business is carried on in British India or not, and it is difficult to lay down what is the minimum activity to be carried on in British India that would justify a finding that business is carried on there, cases often arise in which, while the whole chain of transactions that would constitute a finding that there is a business in British India is

(29) *Smith v Anderson*, (1880) 15 Ch D 247 at page 258, *Rolls v Miller* (1884) 27 Ch D 71 at page 88, *Re Marine Steam Turbine Co.*, (1920) 1 K B 193

(30) *Rogers Pyatt Shellac & Co. v Secretary of State*, 1 I T C 363

(31) 2 I T C 119

not completed in British India, there is no doubt that the transactions that so take place in British India give rise to a profit. In such cases the non resident who completes the transactions outside British India and receives the profit derives a part of that profit from the transactions in British India. These transactions constitute his business connection with British India; and they are usually carried out in British India through branches, factors, agents, receivers or managers. Thus if transactions (say) A, B, C, D and E constitute the complete cycle constituting business, and profits emerge finally only after stage E, and transactions (say) A, B and C are carried on in British India, and D and E outside British India, the profits of the non-resident arise in British India, not from business since the cycle is not complete, but from business connection. This, no doubt, sweeps aside Lord Herschell's distinction (*Grainger* v. *Gough*[32]) between trading *in* a country and trading *with* a country. There is certainly business *connection* in a country in trading *with* that country.

Income earned partly outside—Rule 33—Foreign income-taxes not deductible—

Per *Wallis, C J*—"The question referred to us is whether or not in arriving at the 'total profits' for the purposes of the rule, income-tax and Excess Profits Duty payable in England and income tax payable at stations outside British India are to be deducted. Mr Aingar for the appellant has referred us to *Stevens* v *Durban Roodepart Gold Mining Company*[33] and to certain dicta in *Scottish, etc, Insurance Company* v. *New Zealand Land Company*[34] and *Rover* v. *South African Breweries*,[35] which support the proposition that in England when profits arising abroad are liable under the English Income tax Act to pay income tax in England, a deduction is allowed in respect of the income or similar tax levied on such profits in the places where they arose, and if it were a question here of taxing under section 3 (1) of the Act profits arising outside *British India on the ground that they were received in British* India, those authorities would be applicable, but in my opinion they have no application to the present case What have to be ascertained are the assessable profits arising in British India of the Eastern Extension Australasia and China Telegraph Company which is incorporated in England and has branches in India and elsewhere. But for the rule in question (corresponding to present rule 33) those profits would be ascertained by taking the Indian receipts and debiting against them the expenditure necessary to earn them, and in such a calculation the amount of the tax itself would not be allowed as a deduction The taxes levied

(32) (1896) App Cas 32
(33) 100 L. T 481
(34) 89 L. J. P C. 220
(35) (1918) 2 Ch. 233.

locally on the assessable profits arising in other countries would not enter into the calculation at all As, however, it would be difficult if not impracticable in the case of a business such as this to ascertain the expenditure properly debitable against the Indian receipts, the Government in the exercise of its statutory powers has provided that the assessable profits of the Indian branch without deduction of the Indian income tax shall be deemed to bear the same proportion to the total assessable profits of the company as the Indian receipts bear to the total receipts As the Indian assessable profits are to be ascertained without deduction of the local income tax, it must necessarily be the intention of the rule that the total assessable profits of the business should be arrived at in the same way, *viz*, without the deduction of the several local income taxes and excess profits taxes which are enhanced income taxes Otherwise, the whole basis of comparison would be gone "

Per *Kumaraswami Sastriar, J*—" (After referring to *Ashton Gas Company* v *Attorney General*[36]) The rule in question merely provides the formula for ascertaining the income arising out of the business in British India which is so mixed up with the income arising out of business carried on outside British India that you cannot estimate it with mathematical accuracy By the very nature of the case, the rule is artificial and provides a rough and ready method of arriving at a taxable income As there can be no deduction of the income tax in arriving at the Indian assessable profits if the Indian income were attempted to be arrived at in the usual way, namely, by taking the Indian receipts and deducting the expenditure necessary for the carrying on of the Indian business having regard to the provisions of section 9 of the Income tax Act, it seems to me that the word 'profit' cannot be used in two senses in the rule so as to exclude income tax where one item of the total, namely, Indian income is concerned and to include it as regards other items

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'There can be little doubt that as a matter of accountancy and book keeping and as between shareholders entitled to a dividend and the company income tax paid is always entered as an expense which has to be deducted before the amount divisible as profits can be ascertained and enters into the debit charges in the same way as any other item of expenditure It is equally clear that for purposes of levying income tax you cannot deduct the amount paid or payable as income tax on the ground that it is only what remains that goes to the persons carrying on the business The fact that as between the shareholders and the company you would estimate profits in a particular way is no ground for estimating profits on which income tax has to be calculated in a similar manner "

The Chief Commissioner of Income tax, Madras v *Eastern Extension Australasia and China Telegraph Co, Ltd*[37] (This

(36) (1906) A C 10
(37) 1 I T C 120

was under the 1918 Act, section 3 (1) corresponds to present section 4 (1), and section 9 to present section 10)

United Kingdom Law—

Prior to 1915, though non residents to whom profits arose or accrued from a business or vocation exercised in the United Kingdom were liable to tax, no assessment could be made in the name of the resident agent unless the latter was actually in receipt of the profits That is to say, there was no machinery to enforce the liability The changes made in 1915 are now incorporated in rules 5 to 14 of the General Rules in the 1918 Income-tax Act, and at present it is not necessary that the agent should be in actual receipt of the profits Rules 5 and 6 correspond to sections 42 (1) and 43, but there is nothing corresponding to the proviso under section 43 Rule 7 is almost identical with section 42 (2) Rules 8 and 9 correspond to Rules 33 and 34 Rule 14 of the General Rules distinctly provides that the agent may recoup himself out of any money coming into his hands on behalf of the non resident principal—not necessarily the income that is charged to tax

The English law also provides that if a non resident carries on transactions with other non residents through the agency of a resident no liability to tax attaches unless the resident agent is in receipt of profits [37a] Also, if the non resident is a manufacturer, and his goods are sold in the United Kingdom the profit is divided into two parts, namely, the manufacturing profits and the retail profits, and the former part, *viz*, the profit that the non resident manufacturer would have got had he sold his goods to a retail merchant in England, are specifically exempted from tax—Rule 12 Also, under Rule 10 of the General Rules a non resident principal cannot be charged in the name of a broker or a commission agent in respect of sales carried out by the latter as part of his ordinary business This provision, therefore, gives rise to a complicated question as to what constitutes a regular agent as distinguished from a broker or a commission agent See *Wilcock* v *Pinto*[37b] and *Belfour* v *Mace* [38]

The most important difference between the law in the United Kingdom and the Indian law is the provision under section 42 (1) of the Indian Act, which says that income accruing to a non resident through or from any business connection or property in British India shall be *deemed* to be income accruing or arising within British India This has been noticed in *Rogers*

(37a) *See* Rule 11 and *Macline & Co* v *Eccot* 10 Tax Cases 481
(37 b) 9 Tax Cases 111
(38) 13 Tax Cases 579

Pyatt Shellac Co. v. *The Secretary of State*[39] and *Steel Brothers, case*,[40] but ignored in the *Madras Export Company's case*.[41]

43. Any person employed by or on behalf of a person residing out of British India, or having any business connection with such person, or through whom such person is in the receipt of any income, profits or gains upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of this Act, be deemed to be such agent :

Agent to include persons treated as such

Provided that no person shall be deemed to be the agent of a non-resident person, unless he has had an opportunity of being heard by the Income-tax Officer as to his liability.

History—

Corresponds to section 34 of the Act of 1918. The words "or through whom such person is in the receipt of any income, profits or gains" are however new. These words were inserted in order to get over the *Imperial Tobacco Company* decision (*infra*); but see the discussions in the *Bombay Trust Corporation case* which went up to the Privy Council. There was no corresponding section in the Act of 1886.

Through—

This word according to the Dictionary means "by means of," "through the instrumentality of," and is evidently wider than and includes 'from'.

Several agents—

If the non-resident has more agents than one, there is nothing to prevent the Income-tax Officer from serving notices on all the agents and finally selecting one among them and assessing him on the combined income of the principal through all the agents together. In such cases, naturally, the Income-tax Officer will select the most important of the agents.

In *C. I. R.* v. *Longford*; *Same* v. *Pakenham & others*[42] Rowlatt, J., observed that 'though an agent need not be in receipt of

(39) 1 I. T C. 363
(40) 2 I T C 119
(41) 1 I. T C. 194
(42) 13 Tax Cases 573

the profits taxed he cannot be taxed on profits not made through his agency. It will be observed that section 43 of the Indian Act is much wider than this; and that in cases not falling under section 40 but under section 42 an agent can be taxed even in respect of profits not made through his agency. The point however has not been before the courts in this country.

Opportunity—

The assessment will be invalid unless the agent has been given an opportunity to represent his views. No form has been prescribed for the notice to be served under this section; nor has any time-limit been laid down within which the agent should dispute the proposal to tax him. He is entitled to a reasonable time.

If a resident has been once declared to be the agent of a non-resident after proper opportunity given under this section, it is not necessary for the Income-tax Officer to issue a notice under this section year after year It is for the agent to ask for an opportunity if circumstances have changed. If the agent keeps quiet in the first instance when he comes to be assessed as agent in a particular year, he cannot afterwards impeach the assessment on the ground that the want of notice under section 43 invalidated the assessment.[43]

If the agent returns the form of return unfilled on the ground that it is addressed to the non-resident principal, the Income-tax Officer is entitled to treat the case as one of failure to furnish the return and make the assessment under section 23 (4). (*Ibid.*)

The issue of a notice under section 43 will not prevent the Income-tax Officer from treating the income in question as that of the agent himself if the Income-tax Officer has sufficient reason to think so, and if the agent fails to respond to the notice.[44]

Should Agent be in receipt of profits—

It was held by the Calcutta High Court (Woodroffe and Greaves, JJ.; Ghose, J., dissenting) in the *Imperial Tobacco Co. v. Secretary of State*[45] that section 34 of the 1918 Act (corresponding to section 43 of the present Act) merely defined who may be included as an agent under section 31 (corresponding to section 40) and that the agent under the section must be in receipt of the income under the latter section. Accordingly, if a British Indian Company distributes in British Indian profits to share-

(43) *Nawalkishore Kharaitilal v. Commissioner of Income-tax, Delhi*, A. I. R. 1930 Lah. 1014

(44) *Nopechand Madniram v. Commissioner of Income-tax, Bihar and Orissa*, 2 I. T. C. 143

(45) 1 I. T. C. 169; 49 Cal. 721

holders residing outside British India, the company cannot be deemed to be the agent of the foreign shareholders and assessed as such to super tax in British India But this difficulty has been specially met by section 57 of the present Act as recently amended which makes express provision for the collection of super tax in such cases Ghose, J, on the other hand, held that section 34 (present section 43) should be read with section 33 (present section 42) and not with section 31 (present section 40), and that section 34 merely extended the meaning of "agent" so as to include persons treated as such—who are not really agents—and to assess them under section 33 (1) [present section 42 (1)] In this view, therefore, it was not necessary for the person treated as agent under section 34 (present section 43) to be in actual receipt of income, and the mere fact of agency as determined under section 34 makes him liable to assessment

It will be observed that a non resident's being in receipt of income through a resident is different from the resident agent's being in receipt of income on behalf of the non resident principal A company does not receive its own dividends on behalf of its shareholders, they, on the other hand, receive dividends through it It will be seen therefore that the words added to the section in 1922 make this decision obsolete

Section 43 should, no doubt, be read with all the three previous sections As the law now stands, agents, etc, under sections 40 and 41 should be in receipt of the profits, but not those under section 42 The object of section 42 is to catch profits not received in British India, and the object would be defeated if the agent against whom the Income tax Officer had to proceed was to be in receipt of the profits That is why section 43 refers to persons having business connection with non residents and says nothing as to their being in receipt of profits The words used are "any person or through whom ", not "any person *and* through whom "

The Bombay High Court ruled in the *Bombay Trust Corporation case*[46] that sections 40 to 43 should be read together and that therefore the agent contemplated by section 43 should be in receipt, on behalf of the principal, of the profits sought to be taxed But this view was overruled by the Privy Council on the ground that the plain meaning of section 43 cannot be set aside The view taken by the High Court might have been tenable if section 42 had stood by itself, but section 43 which says nothing about the receipt of the profits on behalf of the principal is explicit to the

(46) 3 I T C 135

effect that the agent satisfying the conditions of that section is to be deemed the agent of the principal for *all* the purposes of the Act Section 42 is one of the purposes of the Act, and an agent under that section need not therefore be in receipt of profits on behalf of the principal [46a]

Liability in case of a discontinued firm or partnership

44 Where any business, profession or vocation carried on by a firm has been discontinued, every person who was at the time of such discontinuance a member of such firm shall be jointly and severally liable for the amount of the tax payable in respect of the income profits and gains of the firm

History—

This is a new section

Discontinuance—

As to what is 'discontinuance', *see* notes under section 25 and 26 The dictum in *Vehalchand Kisorilal* v *Commissioner of Income-tax*[47] that 'discontinuance' may mean total abandonment or self extinction for the purpose of reconstruction appears to ignore the distinction between discontinuance and transfer or succession

Scope of section—

This applies to the business, etc, of a firm that has been *discontinued* The partners will be jointly and severally responsible for the tax payable by the firm, that is, the tax will be calculated on the firm as such under sections 3 and 55 and the Schedule to the Finance Act and this tax, payable by the firm as a whole, recovered from the partners

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CHAPTER V-A [48]

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF SHIPPING

Liability to tax of occasional shipping

44-A The provisions of this Chapter shall, notwithstanding anything contained in the other provisions of this Act, apply for

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(46-a) *Commissioner of Income tax Bombay* v *Bombay Trust Corporation*, 57 I A 49 54 Bom. 216 58 M. L. J 197 (P C)

(47) 2 I T C 338

(48) Inserted by the Income-tax (Further Amendment) Act 1923 (XXVII of 1923)

the purpose of the levy and recovery of tax in the case of any person who resides out of British India and carries on business in British India in any year as the owner or charterer of a ship (such person hereinafter in this Chapter being referred to as the principal), unless the Income-tax Officer is satisfied that there is an agent of such principal from whom the tax will be recoverable in the following year under the other provisions of this Act

Occasional shipping—(Tramp steamers, etc)—

Only one person can be taxed under Chapter V A in respect of a particular ship taking up passengers live stock or goods at ports in British India and that person is the 'principal'' within the meaning of section 44 A Such principal may be either the owner or the charterer of the ship It will be a question of fact in each case in which the ship has been chartered by the owner to another person whether the owner or the charterer is the principal

Chapter V A is only applicable where the principal—(1) carries on business in British India as the owner or charterer of a ship, (2) does not reside in British India and (3) does not employ an agent from whom the tax would be recoverable under section 42 Where there is no charterer the owner will be the principal Where there is a charterer it will be a question of fact whether he or the owner is the principal The business of which the profits are to be calculated and assessed for income tax under Chapter V A is the business of carrying passengers live stock or goods shipped at ports in British India and the person to be taxed is the person (referred to in Chapter V A as the principal) who carries on that business but does not reside in British India, and does not employ any agent from whom the tax would be recoverable under section 42 The criterion to be applied is 'who is the person to whom or on whose behalf money is paid or payable on account of carriage of passengers live stock or goods from a port in British India?'

Generally speaking where there is what is known as a Time' Charter under which the owners may be said to let the ship out to the charterer for a fixed sum for a certain period, during which the owners retain no further control over the vessel or her movements, the owners cannot be held to be carrying on business in British India or even to have a 'business connection' in British India and are therefore not liable to Indian income tax either under Chapter V A or under section 42

Where, however the ship has been chartered under what is known as a 'Voyage or Trip' Charter the position is different Under this kind of Charter party, the charterers are practically in the position of brokers who guarantee to secure a certain quantity of cargo for the owners at certain rates of freight If the full amount of freight cannot be secured the charterers are liable to make good the deficiency Any such deficiency is to be paid by the charterers to the Master, on behalf of the owners in

cash *minus* a certain percentage at the time and place of loading in India Similarly if freight is secured in excess of that stipulated the Master of the ship is to pay such excess to the Charterers at the time and place of loading by demand draft on the owners in London The Bills of Lading are signed by the Master on behalf of the owners and the cargo as soon as shipped is therefore in the constructive possession of the owners and at their risk The ship is usually consigned to the Charterers *or their agents* who look after its interests when in port and for doing so are paid a commission by the owners The owners also pay brokerage In such a case the owners are carrying on business in British India through their agent the Master who receives cargo on their behalf and receives and makes payments on their account in British India and thus the owners having no *regular* or permanent agent in British India are liable to tax under Chapter V A on the profits of the business conducted by the Master on their behalf

If a ship has arrived in a British Indian port either on owner s account or under a charter and the non resident owner or the non resident charterer causes the ship to be chartered or transfers the existing charter or effects a sub charter of the vessel as the case may be such a transaction though it does constitute the carrying on of business in British India by the non resident does not of itself amount to carrying on business within British India as the owner or charterer of a ship within the meaning of Chapter V A But if the ship is loaded in any British Indian port the question whether the non resident owner or the non resident charterer is assessable to income tax under Chapter V A must be decided on the principles stated above Whoever of these two persons causes the ship to be loaded with cargo and is paid the freight for carrying such cargo is the person who carries on business within the meaning of section 44 A (*Income-tax Manual* para 90)

History—

The provisions in this Chapter were introduced in 1923

This Chapter applies to tramps only Regular liners have branches or agents in British India who are taxed under the other provisions of the Act Under the 1886 Act, non Indian shipping companies were specifically exempted *See* section 5 (1) (*a*) of that Act This exemption suggests that the profits were otherwise liable to tax under that Act Under the 1918 Act, this exemption was given by a notification instead of by the statute itself The exemption was withdrawn from foreign shipping companies in 1919 and from British and Dominion shipping companies in 1921 Now all shipping companies are taxed—tramp steamers under this Chapter and regular liners under the other provisions of this Act

Double taxation—Not permissible—

Evidently, both the owner and charterer cannot be taxed simultaneously as *principals* There is nothing, however, to

prevent the owner being assessed as principal under this Chapter and the charterer under "income from business" under the ordinary sections (Chapter III) in respect of his own profits.

44-B. (1) Before the departure from any port in British India of any ship in respect of which the provisions of this Chapter apply, the master of the ship shall prepare and furnish to the Income-tax Officer a return of the full amount paid or payable to the principal, or to any person on his behalf, on account of the carriage of all passengers, live-stock or goods shipped at that port since the last arrival of the ship thereat

Return of profits and gains.

(2) On receipt of the return, the Income-tax Officer shall assess the amount referred to in sub-section (1), and for this purpose may call for such accounts or documents as he may require, and one-twentieth of the amount so assessed shall be deemed to be the amount of the profits and gains accruing to the principal on account of the carriage of the passengers, live-stock and goods shipped at the port.

(3) When the profits and gains have been assessed as aforesaid, the Income-tax Officer shall determine the sum payable as tax thereon at the rate for the time being applicable to the total income of a company, and such sum shall be payable by the master of the ship, and a port-clearance shall not be granted to the ship until the Customs-collector, or other officer duly authorised to grant the same, is satisfied that the tax has been duly paid.

Scope of section—

The provisions are self-explanatory. As it is not possible to calculate the profits in such cases—even the master of the ship cannot do it—an arbitrary rate of profit has been laid down at 5 per cent. of the freight payable to the principal. The Customs-collector will not let the ship go until the tax has been paid.

44-C Nothing in this Chapter shall be deemed to prevent a principal from claiming, in any year following that in which any payment has been made on his behalf under this Chapter, that an assessment be made of his total income in the previous year, and that the tax payable on the basis thereof be determined in accordance with the other provisions of this Act, and, if he so claims, any such payment as aforesaid shall be treated as a payment in advance of the tax and the difference between the sum so paid, and the amount of tax found payable by him shall be paid by him or refunded to him, as the case may be

Adjustment

Scope of section—

As the provisions in this Chapter are only rough and ready provisions for recovering the tax, at source so to speak, in respect of tramp steamers, option has been given to the recipients of such income to be regularly assessed in the next year in the usual course if they prefer it All the adjustments under this section are made by the Non Residents Refunds circle Bombay *See* Note para 11—I T, dated 31 3 28, set out under section 5

CHAPTER VI.

Recovery of Tax and Penalties

45. Any amount specified as payable in a notice of demand under sub-section (4) of section 23-A or under section 29 or an order under section 31 or section 32 or section 33 shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, provided that, when an assessee has presented an appeal under section 30 or under section 33-A, the Income-tax Officer may in his discretion treat the assessee

Tax when payable

as not being in default as long as such appeal is undisposed of

History—

Corresponds to section 29 of the 1886 Act and section 35 of the 1918 Act but is more detailed and elaborate The words "under sub section (4) of section 23 A" and "under section 33 A" were inserted by Act XXI of 1930

Notice of demand—

In respect of an initial demand by the Income tax Officer, including penal assessments under section 28, there can be no default unless a notice has been served by the Income tax Officer as required by section 29, stating the demand payable by the assessee As regards the form of notice, *see* Rules under section 29

Appellate and revisional orders—

Where the amount assessed by the Income tax Officer has not been paid pending the appeal or the appellate authority under section 31 or 32 or the Commissioner under section 33 enhances the demand, the authority is expected to fix the time within which the demand or the additional demand, as the case may be, should be paid It no such time is fixed, the demand or the additional demand is payable on the first day of the second month following the date ot service of the notice or order

See *Mahomed Farid Mahomed Shafee* v *Commissioner of Income tax* set out under section 66, regarding the issue of a demand notice under section 29 in regard to demands arising out of revisional orders under section 33

Stay of enforcement of demand—

When an appeal has been presented, the Income tax Officer is empowered to stay the collection of tax till the appeal has been decided But no assessee can claim such postponement as a matter of right

Default—

As to the meaning of this word, *see* notes under section 46 *infra* The time mentioned in the notice or order need not be later than the first day of the second month following the date of service of the notice or order.

Mode and time of recovery

46 (1) When an assessee is in default in making a payment of income-tax, the Income-tax Officer may in his discretion direct that, in addition to the amount of arrears, a

sum not exceeding that amount shall be recovered from the assessee by way of penalty.

[49] (1-A) For the purpose of sub-section (1) the Income-tax Officer may direct the recovery of any sum less than the amount of the arrears and may enhance the sum so directed to be recovered from time to time in the case of a continuing default, so however that the total sum so directed to be recovered shall not exceed the amount of the arrears payable

(2) The Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land-revenue

(3) In any area, with respect to which the Commissioner has directed that any arrears may be recovered by any process enforceable for the recovery of an arrear of any municipal tax or local rate imposed under any enactment for the time being in force in any part of the province, the Income-tax Officer may proceed to recover the amount due by such process

(4) The Commissioner may direct by what authority any powers or duties incident under any such enactment as aforesaid to the enforcement of any process for the recovery of a municipal tax or local rate shall be exercised or performed when that process is employed under sub-section (3)

(5) If any assessee is in receipt of any income chargeable under the head "Salaries", the Income-tax Officer may require any person paying the same to deduct from any payment subsequent to the date of such requisi-

(49) Inserted by section 8 of Act III of 1928.

tion any arrears due from such assessee, and such person shall comply with any such requisition, and shall pay the sums so deducted to the credit of the Government of India, or as the Central Board of Revenue directs

(6) The Local Government may direct with respect to any specified area, that income-tax shall be recovered therein, with, and as an addition to, any municipal tax or local rate by the same person and in the same manner as the municipal tax or local rate is recovered

(7) Save in accordance with the provisions of sub-section (1) of section 42, no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the year in which any demand is made under this Act

Method of recovery of the tax—

The Income tax Officer is responsible for the recovery of the tax whether the demand represents the tax assessed by himself under section 23 or whether it represents an enhancement made by the Assistant Commissioner on appeal under section 31 or by the Commissioner in exercise of his powers of review under section 33 Notices of demand under section 29 in the form prescribed in rule 20 should be issued at as early a date as possible after the assessment is made under section 23 or when intimation is received of orders of enhancement from superior authorities in order that the tax may be promptly collected The fact that an appeal has been lodged against an assessment should not stop the collection although the Income-tax Officer is empowered, under section 45, in his discretion to treat any assessee as not being in default until an appeal is disposed of When the Income tax Officer considers that an appeal is a *bona fide* appeal, he should in exercise of his discretion under section 45 require the assessee to pay the portion of the tax that is not in dispute, and should, under no circumstances, delay the collection of that portion of the tax which is not disputed in the appeal. Similarly, section 66 (7) of the Act provides that a reference to the High Court shall in no way stop the collection of the tax.

When the tax is not paid within the time prescribed in the notice, or, if no such time is prescribed, by the first day of the second month following the date of the service of the notice or order, the Income-tax Officer should use the powers conferred upon him by section 46 (1) and impose a penalty for the default

Section 46 (3) and (4) provides for cases where a special whole time income-tax staff for the actual collection of the tax is employed in

any area Where such a staff is employed the Commissioner of Income tax may confer upon that staff any of the powers for the enforcement of any process for the recovery of a municipal tax or local rate imposed under any enactment which is in force in any part of the province, e g, the powers of distraint In other areas and, in the areas in which a special staff is employed where the powers for the recovery of municipal taxes or local rates have proved insufficient, the Income tax Officer may, under section 46 (2), forward under his signature a certificate specifying the amount of arrears due from an assessee to the Collector of the district, and the Collector of the district on receipt of such a certificate must proceed to recover the amount specified in the certificate as if it were an arrear of land revenue

Where the defaulter is a salaried person the Income tax Officer may, under the provisions of section 46 (5), require the person paying "salary" to such assessee to deduct from any subsequent payments of "salary" any arrears of tax due from such assessee whether those arrears are due on account of tax on salary' or on income from any other sources or on account of any penalty

The necessity for prompt collection of the tax should be impressed upon Income tax Officers since not only is delay in the collection of this tax likely to result in loss of revenue for other reasons, but, under the provisions of section 46 (7), no proceedings for recovery can be commenced after the expiration of one year from the last day of the year in which the demand is made, with the exception of the special case referred to in sub section (1) of section 42 That sub section refers specially to arrears of tax due from a non resident For the collection of such arrears no time limit is prescribed, as such arrears may be recovered from any assets of the non resident which may *at any time* come within British India

The phrase "proceedings for the recovery of any sum payable under this Act" should be interpreted as relating to proceedings taken under section 46 The issue of a notice of demand is not a proceeding for the purpose of this section

The above remarks regarding recovery of tax apply also under the provisions of section 47 to the recovery of any penalty imposed under section 25 (2) section 28 or section 46 (1) (*Income tax Manual,* para 91)

Default—

Sub section (1) —'Default' is a French word

"I don t know a larger or looser word In its largest and most general sense it seems to mean failing '[50]

"'Default' is a purely relative term like negligence' It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do having regard to the relations which you occupy towards the other persons interested

(50) *Per* Eyre, C J, in *Doe and Dacre* v *Dacre*, 1 B. & P 258.

in the transaction"—*Per* Bowen L J, in Re *Young and Harston*[1] and Collins L J, in Re *Woods and Lewis*[2] (Stroud)

In this section 'default' simply means failure to pay Therefore notwithstanding the vague meaning of this word and the words "in his discretion" occurring in the sub section, the Income tax Officer can evidently levy a penalty even if an assessee is able to satisfy him that the default was not due to the assessee's negligence and was due to circumstances beyond his control

Progressive penalties—

Sub section (1 A) which was inserted by Act III of 1928 fills up a gap in the Act In the absence of express provision for progressive penalties and in view of the rule of construction that penal provisions should be construed strictly, Income tax Officers formerly adopted the cumbrous expedient of levying the maximum penalty once for all and remitting a portion of it if the assessee paid up within a specified period

Payment of Income-tax—

This expression evidently includes payment of sums due under orders passed in revision by the Commissioner under section 33 Thus, if an Income tax Officer makes a refund in excess by mistake and the Commissioner orders the recovery of the excess refund, the recovery of the excess sum is presumably 'payment of income tax' within the meaning of this section That is, section 46 (1) should be read in conjunction with section 45, which refers to orders under section 33

Limitation—

The 'proceedings' referred to in sub section (7) evidently refer to proceedings under this Act and not to the subsequent proceedings under the Public Demands Recovery Act It will therefore be sufficient if the Income tax Officer forwards the certificate to the Collector in time

Police Officer—Executing warrants—

In the absence of the Commissioner's orders under sub sections (3) and (4) of this section, the Collector has no power to issue a distress warrant for the realisation of arrear of income tax as though they were arrears of Municipal tax Nor has the Collector authority to issue such a warrant to an officer of the Police nor is such a Police Officer executing such a warrant acting

(1) 31 Ch D 174
(2) (1898) 2 Ch 211

in the execution of his duty as a Police Officer, consequently, . resistance to such Police Officer is not an offence under section 3, Indian Penal Code[3]

rear of income-tax—Not same as arrear of land revenue—

The effect of the Act is not to convert income tax into an rear of land revenue due in respect of the land which may be ought to sale for the realisation of the income tax, but merely extend the procedure prescribed by the Revenue Recovery Act the recovery of arrears of income tax

In a case, therefore, in which a mortgaged property was ld on account of the default of income tax of one of the sharers, was held that the sale affected only the defaulter's share in e mortgaged property and not the shares of the other sharers[4]

See also *Ibrahim Khan* v *Rangasami Naicken*,[5] a case of le for abkari revenue, and *Sankaran* v *Ramaswami*,[6] a case of le of land on which there was a charge on account of a Land nprovement Loan from Government

iority—Claim of Crown—Income tax—

One of the earliest cases on the subject in India is *Collector Moradabad* v *Muhammad Dain*[7] in which it was held that the mmon Law of England under which the Crown had a priority claim in respect of debts was applicable to India also This ew was dissented from in *Ramachandra* v *Pitchaikanni*[8] in ich it was considered that except in the case of a claim for land venue which is definitely charged on the land by statute, the own had no priority of claim This decision was given having ard to historical considerations under which the present Gov ment in India merely succeeded to the rights and liabilities of East India Company A doubt however was expressed as he position in Presidency towns which were under the juris ion of the old Supreme Courts and in which the English mmon Law had been applied

The position was again reviewed in *Bank of Upper India Administrator General*[9] in which it was held, following the s below, Re *Henley & Co*[10], *New South Wales Taxation Com*

(3) *Jairam Sahu* v *Emperor* 1 I T C 201
(4) *Kadir Mohidin* v *Muthukrishna Iyer* 1 I T C 6, 26 Mad 230
(5) 28 Mad 420
(6) 41 Mad 691
(7) 2 All. 196
(8) 7 Mad 434
(9) 45 Cal 653
(10) (1878) L R 9 Ch D 469

missioners v *Palmer*,[11] and *Rex* v *Wells*,[12] that the Crown had priority over a second mortgagee but not over a first mortgagee, both being English mortgagees The *ratio decidendi* was that the first mortgagee had a right of property whereas the second had only a right of redemption which the insolvent owner also had, and that as between concurrent claims the Crown had precedence It was also held that the rule was of universal application in the absence of statutory provision to the contrary It should be noted, however, that this was a case in the original jurisdiction of the Calcutta High Court.

Attention is also invited to the dicta of the Privy Council in *Ragho Prasad* v *Mewalal*[13]

As regards the present position of the law in England regarding priority of Crown debts in the winding up of companies, see *Food Controller* v *Cork*[14]

Companies—Winding up—Priority of taxes—

"Section 230, Indian Companies Act—

(1) In a winding up there shall be paid in priority to all other debts—

(*a*) all revenue, taxes, cesses, and rates, whether payable to the Crown or to a local authority, due from the company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date,

(*b*) all wages or salary of any clerk or servant in respect of service rendered to the company within the two months next before the said date, not exceeding one thousand rupees for each clerk or servant, and

(*c*) all wages of any labourer or workman, not exceeding five hundred rupees for each whether payable for time or piece work, in respect of services rendered to the company within the two months next before the said date

(2) The foregoing debts shall—

(*a*) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportion, and

(*b*) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge

(11) (1907) A C 179
(12) (1912) 16 East 278, 282
(13) 34 All 223 (P C)
(14) (1923) A C 647

(3) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them

(4) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof

Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made

(5) The date hereinbefore in this section referred to is—

(*a*) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order, and

(*b*) in any other case, the date of the commencement of the winding up "

Priority under this section can apparently be claimed only if the assessment has been made and also fallen due before the date referred to above, otherwise the Crown has, it would seem, no claim of priority But there is nothing to prevent the Crown making its claim under section 25 (Discontinuance of business) or under section 26 (Succession) in the usual course These claims are quite different from a preferential claim in respect of tax already assessed and due from the company

Bankruptcy—Proof of claims—

In In re *Calvert*[15] it was held that a proof made in bankruptcy by a Collector of Taxes in respect of arrears of income-tax due could not be expunged on the ground that the debtor had not in fact made the profit assessed The principle of this decision will presumably apply to India The point is that once the liability to tax and the amount of tax have been determined by the proper authority, and the assessee has not availed himself of the remedies open to him under the Income tax Act, the decisions of the revenue officers cannot be challenged elsewhere

In In the Matter of the *Watchmakers' Alliance and Ernest Goode's Store, Limited*[16] the liquidators of a company paid away all the assets to contributors and others without making provisions for a Crown debt for income-tax *Held*, that the liquidators misapplied the assets, within the meaning of section 10 of the

(15) 4 Tax Cases 79
(16) 5 Tax Cases 117

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(*b*) all wages or salary of any clerk or servant in respect of service rendered to the company within the two months next before the said date not exceeding one thousand rupees for each clerk or servant, and

(*c*) all wages of any labourer or workman, not exceeding five hundred rupees for each whether payable for time or piece work, in respect of services rendered to the company within the two months next before the said date

(2) The foregoing debts shall—

(*a*) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportion, and

(*b*) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge

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(15) 4 Tax Cases 79

(16) 5 Tax Cases 117

Companies (Winding up) Act, 1890, and must pay the amount of the Crown debt, and that, in default of payment, a writ of attachment was issuable as a matter of right, the Court having no discretion in the matter *See* section 230 of the Indian Companies Act set out *supra*

Can Crown sue for recovering tax?—

As to the right of the Crown to recover taxes generally by action

"If the newly created duty is simply an obligation to pay money for a public purpose the general rule would seem to be that the payment cannot be enforced in any other manner than that provided by the Act It is however a general rule that where an Act of Parliament creates an obligation to pay money, the money may be recovered by action unless some other provision is contained in the Act, that is unless an exclusive recovery is given, and the question may arise whether the particular remedy given by the Act is cumulative or substitutional for this right of action "[17]

It will be seen that the above passages refer not only to taxes but to all monetary obligations imposed by a Statute In the case of tax due to the Crown, which is not like a private debt, the tendency is to so construe the Acts as to exclude by implication the right to recover the tax in any other mode than what is provided in the Acts There is no decided case in India on the subject so far as it affects income tax, and the decided cases on obligations or rights created by other Acts do not help to decide whether the remedies provided in the Income tax Act are exclusive or in addition to the right of the Crown to recover the tax by action The question however is academic because it will not suit the Crown to resort to the cumbrous process of a suit when summary remedies are at its disposal

In the United Kingdom, section 169 of the Act of 1918 expressly allows the Revenue to recover tax by suit as well as by summary means specially provided in the Act

In In re *Henley & Co*,[18] in which a Company was being wound up under the supervision of the Court, the Court of Appeal (James, L J) said "There is nothing to prevent the Crown from suing the company or distraining their chattels, not only on the property, but anywhere else" for the purpose of recovering income tax to which the Crown has under the English law a prior claim over other debts But see *Food Controller* v *Cork*[19]

(17) Maxwell's *Interpretation of Statutes* 6th edition, pp 710 and 711

(18) 1 Tax Cases 209

(19) (1923) A C 647

Attachment of debts for recovering tax—

Under the 1886 Act, not only had the Collector power to recover arrears of income tax like arrears of land revenue or municipal taxes, but his order had the force of a decree of a Civil Court, and the Collector had powers to enforce the decree in the same manner as a Civil Court can enforce its decrees This last power has now been taken away, since 1918, and the Income tax Officer can only resort to the Collector for recovery of income tax as an arrear of land revenue or arrange to recover the tax like an arrear of municipal taxes In either case, the powers are limited by the local Acts for the realisation of arrears of land revenue and municipal taxes If neither of them (the provisions of these Acts vary from province to province and in some cases from place to place in the same province) provides for the attachment of debts, the Crown cannot attach the assessee's debts in order to secure payment of income tax Whether the Crown can sue the assessee and get the debt attached would depend on whether a suit would lie

Corporations—Disappearance of—

The above remarks however apply to cases of individuals only Corporations (Hindu undivided families companies and firms) stand on a different footing If a firm is dissolved or a company liquidated but the business continues, section 26 will apply But if the business is given up, section 25 will apply The same sections will also govern the business profits of an individual becoming bankrupt according as the business is ontinued or not

Recovery of penalties

47 Any sum imposed by way of penalty under the provisions of sub-section (2) of section 25, section 28 or sub-section (1) of section 46 shall be recoverable in the manner provided in this Chapter for the recovery of arrear of tax

This section appeared for the first time in 1922 It is more or less superfluous It is clear from sections 29, 45 and 46 that 'income tax' for the purpose of section 46 includes the various penalties under section 25 (2), section 28 and section 46 (1)

CHAPTER VII.

REFUNDS

Refunds

48 (1) If a shareholder in a company who has received any dividend therefrom satisfies the Income-tax Officer or other authority

appointed by the Governor-General in Council in this behalf that the rate of income-tax applicable to the profits or gains of the company at the time of the declaration of such dividend is greater than the rate applicable to his total income of the year in which such dividend was declared, he shall, on production of the certificate received by him under the provisions of section 20, be entitled to a refund on the amount of such dividend (including the amount of the tax thereon) calculated at the difference between those rates

(2) If a member of a registered firm satisfied the Income-tax Officer or other authority appointed by the Governor-General in Council in this behalf that the rate of income-tax applicable to his total income of the previous year was less than the rate at which income-tax has been levied on the profits or gains of the firm of that year, he shall be entitled to a refund on his share of those profits or gains calculated at the difference between those rates

(3) If the owner of a security from the interest on which, or any person from whose salary, income-tax has been deducted in accordance with the provisions of section 18, satisfies the Income-tax Officer or other authority appointed by the Governor-General in Council in this behalf that the rate of income-tax applicable to his total income of the previous year was less than the rate at which income-tax has been charged in making such deduction in that year, he shall be entitled to a refund on the amount of interest or salary from which such deduction has been made calculated at the difference between those rates

*[(4) For the purposes of this section, 'total income' includes, in the case of any person not resident in *British*

* Sub sections (4) and (5) were inserted by Act III of 1928

India, all income, profits and gains wherever arising, accruing or received, which, if arising, accruing or received in British India, would be included in the computation of total income under section 16

(5) Nothing in this section shall entitle to any refund any person not resident in British India who is neither a British subject as defined in section 27 of the British Nationality and Status of Aliens Act 1914 nor a subject of a State in India]

Rule 36 —In the case of a person resident in British India, an application for a refund of income tax under section 48 of the Act shall be made in the following form —

Application for refund of income tax

I,——————————of——————————

——————————————————————

do hereby state that my total income computed in accordance with section 16 of the Indian Income tax Act, XI of 1922, accruing or arising or received in British India, or deemed under the Act to accrue or arise or to be received in British India, during the year ending on the 31st March 19 , amounted to Rs ——————only

I therefore pray for a refund of

Rs —————— under "Salaries"

Rs —————— under "Securities"

Rs —————— under "Dividends from companies"

Rs —————— under "Share of profits of the registered firm"

known as——————————of which I am a partner

Signature——————

I hereby declare that I am resident in British India, and that what is stated in this application is correct

Dated——————19

Signature——————

Rule 36-A.—In the case of a person not resident in British India, an application for a refund of income-tax under section 48 of the Act shall be made in the following form:—

Application for refund of income-tax.

I,————————of————
residing at————————in————————(country) do hereby state that my total income computed in accordance with section 48 (4) of the Indian Income-tax Act, 1922, during the year ending on the 31st March 19 , amounted to Rs.——— only, as per return enclosed.

I therefore pray for a refund of

Rs.———— under "Salaries"
Rs ———— under "Securities"
Rs ———— under "Dividends from companies"
Rs.———— under "Share of profits of the registered firm"
known as————————of which I am a partner

Signature————

I hereby declare that I am a ——— British subject / subject of ——— State being a State in India

I also declare that what is stated in this application is correct.

Dated————————19 .

Signature————

Sworn before me (Name)
Designation Signature at on

Seal

NOTE.—The above declaration shall be sworn (a) before a Justice of the Peace, a Notary Public or a Commissioner of Oaths if the applicant for refund resides in any part of His Majesty's Dominions outside British India, (b) before a Magistrate or other official of the State or a Political Officer if he resides in a State in India, and (c) before a British Consul if he resides elsewhere.

Rule 37.—The application under rule 36 shall be accompanied by a return of total income in the form prescribed under section 22 unless the applicant has already made such a return to the Income-tax Officer.

Rule 37-A.—The application under Rule 36-A shall be accompanied by a return of total income in the following form the details of Part I of which but not the total may be omitted if the person has already submitted a return under section 22 (2) for the same year.

PART I.

Statement of total income accruing or arising or received in British India, or deemed under the Act to accrue or arise or to be received in British India during the previous year.

1 Sources of income	2 Amount of profits or gains or income during the previous year	3 Tax already charged on the income
	RS A	RS A
1 Salaries (including wages, annuity, pension, gratuity, fees, commission, allowances, perquisites, including rent free quarters) or profits received in lieu of or in addition to, salary or wages [*See* note (1)]		
1 A The contributions made by an employer to the account in a recognised provident fund of the person making the return		
1 B The interest accruing to the account mentioned in 1 A which is not exempt from income tax [Section 58 F (2)]		
2 Interest on securities (including debentures) already taxed " (2)		
3 Interest on securities of the Government of India or of Local Governments declared to be income tax free " (3)		
4 Property as shown in detail in Schedule A " (4)		
5 Business, trade, commerce, manufacture, or dealings in property, shares or securities (details as in note 5) " (5)		
6 Profession " (6)		
7 Dividends from companies " (7)		
8 Interest on mortgages, loans, fixed deposits, current accounts, etc, not being income from business		
9 Ground rent		
10 Any source other than those mentioned above including any income earned in partnership with others " (8)		
Total		
Deductions claimed— (a) on account of insurance premia (b) on account of contributions to a provident fund to which the Provident Funds Act applies (c) on account of contributions to a recognised provident fund [section 58 A (a)] (d) others		

PART II

Statement of total income, profits and gains in the previous year, arising, accruing or received out of British India, which, if arising, accruing or received in British India, would be included in the computation of total income under section 16

Name of Country	Sources of income	Amount of profits or gains or income during the previous year
	1 Salaries * (*see* Note 10)	RS
	2 Securities * (*see* Note 11)	
	3 Property * (*see* Note 12)	
	4 Business * (*see* Note 13)	
	5 Profession * (*see* Note 14)	
	6 Dividends from Companies * (*see* Note 15)	
	7 Interest on securities other than in item 2 above mortgages loans fixed deposits current accounts etc, not being income from business * (*see* Note 16)	
	8 Ground rent *	
	9 Any source other than those mentioned above including any income earned in partnership with others (*see* Note 17)	
	Total	
		RS
	Total as per Part I	
	Total as per Part II	
	Grand total	

*The figures for each country should be separately shown.

Verification.

I declare that to the best of my knowledge and belief the information given in the above statement is correct and complete, that the amounts of income shown are truly stated and relate to the year ended and that no other income accrued or arose or was received by $\frac{\text{me}}{\text{the firm}}$ during the said year and that $\frac{\text{I}}{\text{the firm}}$ have no other sources of income.

Date Signature.

N B—(a) *Income accruing to you outside British India received in British India, should be entered in Part I and not in Part II*

(b) *All income from whatever source derived must be entered in the form including income received by you as a partner of a firm*

(c) "Previous year" means the twelve months ending on the 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st day of March, then at the option of the assessee the year ending on the day to which his accounts have so been made up

NOTE 1—In column 2 should be shown the gross amount of salary and not the net amount after deductions on account of income tax, provident funds, etc

NOTE 2—"Interest on securities" means the interest on promissory notes or bonds issued by the Government of India or a Local Government, or the interest on debentures or other securities for money issued by or on behalf of a local authority or company Where income tax has been deducted from the interest, or where the interest has been paid income tax free, the amount of tax so deducted or paid should be added to the amount of interest actually received, and the gross amount so arrived at should be entered in column 2 of the statement The term "interest on securities" does not include interest on fixed deposits or mortgages or other loans, which have to be shown under heading 8

The interest on securities of the Government of India or of Local Governments declared to be income-tax free should be shown under head 3 Those which are not declared to be income tax free should be included under this head

Entries under this head must be supported by the certificate issued by the person or company paying the interest under section 18 (9) of the Act

NOTE 3—(a) The income tax payable on the interest receivable on a security of a Local Government issued income tax free is payable by the Local Government and not by the holder of the security

(b) Only the interest on securities of the Government of India or of a Local Government declared to be income tax free should be entered against this head Such interest will not be charged to income tax but it must be included in the statement of total income in order to ascertain the rate of income tax chargeable on other income *It is chargeable to super tax*

(c) Particulars of any interest on securities issued by other authorities and stated to be free of income tax should be entered against head 2, as income tax on such interest is actually paid by these authorities on behalf of the recipients

NOTE 4—The tax is payable under this head in respect of the *bona fide* annual value of any buildings or lands appurtenant thereto, of which you are the owner, other than such portions of such buildings and lands as you may occupy for the purpose of your business.

SCHEDULE A—As in form prescribed in Rule 19

NOTE 5—(a) Where you keep your accounts on the mercantile accountancy or book profits system, you must file a return in the following form —

Income, profits or gains from business, trade, commerce

	Rs	A
Income, profits or gains as per Profit and Loss Account for the year ended 193 .		
Add any amount debited in the accounts in respect of—		
1 Reserve for bad debts		
2 Sums carried to reserve for provident or other funds ..		
3 Expenditure of the nature of charity or presents .		
4 Expenditure of the nature of capital		
5. Income tax or super tax		
6 Drawings or salary of proprietor or partners		
7 Rental value of property owned and occupied		
8. Cost of additions to, or alterations, extensions, improvements of any of the assets of the business		
9 Interest on the proprietor's or partner's capital, including interest on reserve or other funds		
10 Losses sustained in former years		
11 Losses recoverable under an insurance or contract of indemnity		
12 Depreciation of any of the assets of the business		
13. Private or personal expenses and expenses not incurred solely for the purpose of earning the profits		
TOTAL ..		
Deduct—Any profits included in the account already charged to Indian income tax and the interest on securities of the Government of India or of Local Governments declared to be income tax free.		
Balance ..		

(Signature of the person making the return.)

Dated 193 .

(b) Where you do not keep your accounts in such a form, you must file a statement showing how you arrive at the taxable profits, i.e., showing *details of the gross receipts* and of the expenditure you propose to set against those *receipts*. No deductions are permissible on account of—

(i) Property owned and occupied by the owner of a business for the purposes of a business;

(ii) Additions to, or alterations, extensions, or improvements of, any of the assets of the business;

(iii) Interest on the capital of the proprietors or partners of *the business*;

(iv) Bad debts not actually written off in the accounts;

(v) Losses sustained in previous years;

(*ii*) Reserves of any kind,

(*iii*) Sums paid on account of the income tax or super tax or any tax levied by a local authority other than local rates or municipal taxes in respect of the portion of the premises used for the purpose of the business,

(*viii*) Any expenditure of the nature of charity or a present,

(*ix*) Any expenditure of the nature of capital,

(*x*) Any loss recoverable under an insurance or a contract of indemnity,

(*xi*) Depreciation of any kind other than that specified in the Act

(*xii*) Drawings or salaries of the proprietors or the partners,

(*xiii*) Private or personal expenses of the assessee,

(*xiv*) Any expenditure of any kind which is not incurred solely for the purpose of earning the profits

If you have included any such sums in your expenditure in your books, you must exclude them from the expenditure permissible for the purpose of arriving at your taxable profits

(*c*) You are also required to attach a statement showing the sums charged in your accounts under the provisions of section 58 K (2)

NOTE 6—The income, profits or gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred *solely* for the purpose of such profession or vocation, provided that no allowance is made on account of any of your personal expenses Professional fees received by you in any part of India (whether within British India or not) must be included by you in your receipts

NOTE 7—Income tax chargeable on the profits of companies is paid by the companies, so that the dividends received by shareholders represent the net amount remaining after any income tax due by the company has been paid This amount should be entered in column 2 of the statement The proportionate tax will be added in the Income tax office

If the rate of tax applicable to your total income is less than the rate of income tax applicable to the profits or gains of the company at the time of the declaration of such dividends, you may, by attaching the company's certificate received with the dividends, have the excess collected on your dividends from the company set against the tax payable by you on your other income instead of having to apply separately for a refund

Where a company derives a part of its profits in British India and part outside British India, such portion of its dividend as is payable out of profits taxable in British India should be shown in Part I under item 7 and the balance in Part II under item 6

NOTE 8—Agricultural income from land not paying land revenue or local rates to an authority in British India should be included under this head

NOTE 9—Deductions from total income can only be made for insurance premia in respect of insurance on your own life or on the life of your wife, or in respect of a contract for a deferred annuity on your own life or on the life of your wife. No deduction is permissible in the case of any other form of insurance except in the case of Hindu undivided families where deductions are permissible on account of premia paid in respect of insurance on the life of any male member of the family or of his wife The original receipt or the certificate of the insurance company to which the premium was paid must be attached to the return

NOTE 10—The gross amount of salary and not the net amount after deductions on account of income-tax, provident fund, etc., should be shown

NOTE 11—Under this head should be shown interest on securities issued by the Government of India or a Local Government or a local authority in India on which interest is paid or payable outside British India, and the interest on debentures of companies operating in India paid or payable outside British India For this purpose

"*Company*" means "a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, *or of an Act of the Legislature* of a British possession, and includes any foreign association carrying on business in British India whether incorporated or not, and whether its principal place of business is situate in British India or not, which the Central *Board* of Revenue may, by general or special order, declare to be a company for the purposes of this *Act*" Interest on all other securities should be shown under item 7—*see* Note 16 Interest should be shown *gross if* foreign tax is deducted therefrom after the assessee receives the interest, if the tax is deducted at source, the net interest received should be shown

NOTE 12—*See* instructions in Note 4

NOTE 13—The details should be given as explained in Note 5 but there will be no "deduct" entry on account of profits included in the amount already charged to Indian income tax and the interest on securities of the Government of India or a Local Government in India declared to be income tax free

NOTE 14—This should show professional fees received outside British India

NOTE 15—The figure to be shown here is the amount actually received by the shareholder irrespective of whether the dividends are declared free of tax or not

Where a company derives a part of its profits in British India, and part outside British India, such portion of his dividend as is payable out of profits taxable in British India should be shown in Part I, under item 7 and the balance in Part II under item 6

NOTE 16—This head will include *inter alia* interest on all securities other than those entered in item 2, *see* Note 11 Interest should be shown gross *if foreign* tax is deducted therefrom after the assessee receives the interest, if the tax is deducted at source, the net interest received should be shown

NOTE 17—Agricultural income from land not included in Part *I should be* shown under this head

Rule 38.—Where the application under rule 36 or rule 36 A is made in respect of interest on securities or dividends from companies, the application shall be accompanied by the certificate prescribed under section 18 (9) or section 20, as the case may be.

Rule 39—The application under rule 36 or rule 36 A shall be made as follows:—

(*a*) If the applicant is resident in British India, to the Income-tax Officer of the district in which the applicant is chargeable directly to income-tax or, if he is not chargeable directly to income-tax, to the Income-tax Officer of the district in which he ordinarily resides;

(*b*) If the applicant is resident outside British India, to the Income tax Officer appointed by the Central Board of Revenue.

See also Rule 41 set out under section 49.

History—

There were, no specific arrangements for refunds based on difference of rates under the 1886 Act. The first provision for such refunds was made in 1916, when higher rates were introduced and the graduation made steep. In the first instance, the procedure was regulated by rules made by

the Local Governments In 1918 the Act itself provided for refunds—*see* section 37 of that Act The present section is partly an amplified version of that section, but it has also been altered with reference to the new method of assessment under the 1922 Act under which the assessment is made on the 'total income' after set off under section 24

Sub sections (4) and (5) were inserted by Act III of 1928 Their object is given in the Statement of Objects and Reasons as below "Following the British Income tax law,[20] it is proposed to withhold the grant of refunds under section 48 (small incomes relief) in respect of dividends of Companies and interest on Indian securities from non residents who are not British subjects or subjects of Indian States, while refunds to non resident British subjects or subjects of Indian States will be allowed and calculated not with reference as at present to the claimant's total income taxable in British India, but with reference to his total income wherever derived which would be taxable if it accrued, arose or was received in British India "

The words "or authority appointed by the Governor General in Council in this behalf" were inserted in the first three sub sections by Act XXII of 1930 to enable refunds to be made through the High Commissioner for India in London

Registered firm—

No refund can arise to a partner in respect of an unregistered firm or a member of an association not being a company or firm or a member of a Hindu family A registered firm, if it is assessed, is assessed at the maximum rate, and the partners get a refund if eligible If the registered firm is not assessed, the share of profits will be taxed in the hands of the partner—*see* section 14

Meaning of words—

'*Security*'—*see* section 8

'*Shareholder*' includes stockholder—*see* notes under section 14

'*Company*'—*see* section 2 (6)

'*British subject*'—*see* section 42 (2)

'*Resident*'—*see* section 4 (2)

Refund of income tax—

Refunds are necessitated owing to the system of taxation at the source which occurs in the case of the tax on companies and on registered firms [section 48 (1) and (2)] and of deduction at the source, which

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(20) *See* section 24, U K. Finance Act, 19?0

occurs in the case of "interest on securities" and "salaries" [section 48 (3)] In both these cases, the rate of tax appropriate to the "total income" of the recipient (the shareholder, partner, security holder or salaried person) is not known at the time that the tax is assessed or deducted As stated in paragraph 61, in order to simplify the procedure in connection with refunds, section 18 (9) makes it obligatory upon the person deducting income tax from "interest on securities" to issue to all security holders a certificate specifying the *amount of the tax deducted* from the interest and the rate at which it has been deducted, and similarly section 20 (*see* paragraph 63) requires the principal officer of a company distributing dividends to issue to shareholders a certificate stating that the company has paid or will pay income tax on the profits that are being distributed These certificates (or, in the case mentioned in paragraph 62 a certificate by a bank) must ordinarily be accepted by Income tax Officers as conclusive proof that tax has been paid

For the reasons given in paragraph 63, the Income tax Officer, for purposes of refund in the case of dividends, has to assume that the dividends mentioned in the certificate were taxed at the maximum rate current on the date when the dividends were *declared* In the case both of dividends and of interest on securities, the tax deducted has to be added to the "net" dividend or interest paid, for the purpose of calculating both the 'total income' of the applicant and the amount of refund due [*see* paragraph 57, and section 48 (1)]

A company, a substantial portion of whose income is *known* to be derived from tax free securities should be required to certify, as the statutory form prescribed in rule 14 provides, what percentage of its income in a given year has actually paid tax or is liable to pay tax, and if a shareholder receives a dividend from a company that derives a substantial portion of its income from tax free securities, the shareholder should only be allowed a refund under section 48 in respect of a proportion of his dividend corresponding to the proportion of the company's income that is subject to tax

Where the amount distributed by a company as dividends exceeds the total income, profits or gains as calculated for income tax purposes of the company for the year in question, taxed and untaxed, which includes cases where there is no income, profits or gains, or a loss (for example, where net receipts from non tax free sources are wiped out or exceeded by the depreciation allowance) the refunds to shareholders should be calculated with reference to the proportion borne by the tax free income to the total amount distributed *less* the tax free income

In cases where the applicant is resident outside British India the application should be made to the Income tax Officer, Non Resident Refund Circle, Bombay The Income tax Officer will, however, allow a claimant who resides in an Indian State, the option of receiving payment of the refund through the Political Officer in that State, that is to say, the refund voucher that will be issued by the Income tax Officer will be made payable, if the person applying for the refund so desires, at the Political Treasury of the Government of India in the particular Indian State, or

if there is no treasury under the control of the Political Officer, at the prescribed British Indian Treasury

The necessity for refund of tax on Government securities can be avoided, by the procedure laid down in paragraph 61, in the case of persons who are either not liable to the tax, or who have a taxable income which is sufficiently stable to justify the Income tax Officer in assuming that the rate applicable to the total income is not likely to move from one grade to another Again, as has been pointed out in preceding paragraphs, the necessity for a refund can also be avoided, in the case of persons who have income which has not been taxed, or from which income tax has not been deducted, at the source since such persons can claim a set off against the tax due on that other income

In cases where a cash refund is necessary, the procedure laid down in rules 36 to 40 should facilitate the granting of refunds The application must be made in the form prescribed in rule 36 by persons resident in British India and in that prescribed by rule 36 A by persons not resident in British India, and verified in the manner laid down in those rules and must, under rule 37 or rule 37 A, be accompanied by a return of the "total income" in the form prescribed in rule 19 unless such a return has previously been made or that prescribed by rule 37 A as the case may be A false statement in such a return or in such a verification is punishable under the provisions of section 182 of the Indian Penal Code, which are set out in paragraph 66 above The application must also where necessary, be accompanied by the certificates mentioned in section 18 (9) or section 20 The applications under rule 40, need not be presented in person but may be sent by post or by an authorised agent In cases where the applicants residing in India do not present themselves, the amount of any refund due should be remitted by money order, in which event the cost of the money order is borne by the Government and is not to be deducted from the amount to be refunded If the applicants reside out of India, the amount of refund under section 48 or 49 of the Act will be remitted to them by a bank draft or money order at their cost unless they appoint agents to receive payment in India

It should be particularly noted that section 48 does not apply to super tax (*see* section 58) since super tax is not deducted at the source or taxed at the source with the solitary exception of the case referred to in section 57, in which case no claim for any refund can arise (*Income-tax Manual*, para 92)

Non-residents—

If the non-resident is not a British subject or a subject of an Indian State, no refund is admissible, if he is a British subject or a subject of an Indian State, he is entitled to a refund but at the difference between the maximum rate of income tax and the rate applicable to his total income not only in British India but also elsewhere These provisions are based on similar provisions in the United Kingdom Acts—*see* section 24 of the Finance Act of 1920

Limitation—

See section 50

Partially taxed profits—

The following principle should be adopted in calculating the net dividends and regulating refunds on dividends, paid from profits that are only partly taxed in the hands of the company, *e g*, companies a part of whose income arises or accrues outside British India and is not received in British India or part of whose income is derived from tax free securities —

If x per cent of the profits pay tax in the hands of the company, the total income of the shareholder for the purpose of refunds is x per cent of the net dividend multiplied by 32|29 taking the maximum rate of income tax as one anna and six pies That part of the profits of the company which is not taxed in its hands will, of course, be taxable in the hands of the shareholder under section 14 (2) (*a*) if the income is liable to tax under section 4 (1) and is not exempt under section 4 (3) or under one of the notifications issued under section 60 But no addition on account of income tax should be made to the part of the dividends not taxed in the hands of the company in computing the shareholder's total income (*Income tax Manual*, para 2)

Onus of proof—

"The onus of proving the claim to refund (and therefore of adducing satisfactory evidence of his total income) of course lies on the claimant, and if he fails to discharge it, his claim should be rejected It is not necessary, however, for the purpose of such claims to do more than ascertain the grade of tax applicable or to compute the income exactly Certificates by income tax authorities in the United Kingdom or a Dominion, should be accepted as proof of the amount of total income Certificates of responsible officials should also be accepted in support of claims presented by subjects of Indian states" (*Income tax Manual*, para 92)

Certificates—Not conclusive—

The certificates granted under section 20 and rule 14 are not conclusive evidence by which the Income tax *Officer is* bound He may, if he likes, take further steps to check the correctness of those certificates before granting a refund

At the time of declaration of such dividend—

This expression has been used and not the 'rate levied on the profits' or a similar expression is in sub sections (2) *or* (3) because the shareholder is entitled to relief irrespective of whe

then the company is taxed in the year in question or not The dividend may be paid out of reserve or the company may provide for less depreciation than is allowed for income tax Also, the rate of tax payable by the company would depend on how its accounting year, i e, 'previous year' fits into the financial year

Refund calculated on gross dividend—

Though the shareholder receives only a net dividend, it is the gross dividend that enters into his 'total income'—*vide* section 16, and it is on this gross dividend that refund is allowed

Refund—Rate of—How calculated—

The refund is given at the difference between the rate of tax applicable to the profits of the company at the time of declaration of dividend and the rate applicable to the shareholder's total income in the year in which the dividend is declared The two rates may conceivably be regulated by the Finance Bills of two different years The rate in either case depends on the accounting year, i e, the 'previous year' of the company and the shareholder respectively Thus if the company declares an annual dividend on say, 1st February, 1926 on which date its accounts are closed its profits would be taxed by the Finance Act of 1926 27, if the shareholder kept his accounts by the year ending say, September, the dividend would come to be assessed in his hands in the year 1927 28 Until he came to be assessed, his total income would of course not be known

Company wound up—

What a shareholder receives in the winding up of a company is capital If a preference shareholder should receive arrears of dividend at the time of winding up, such arrear dividends are nevertheless capital That is, they are not dividends at all but represent a share of capital computed in a particular manner In re *Dominion Tar and Chemical Co Ltd*, 8 A T C 587 No refund of tax should apparently be allowed on such dividends

Deceased person's estate—Title to refund—

A condition precedent to the grant of refund under this section is the submission of a Return of Income—*see* rule 37 A deceased person's estate therefore cannot get a refund unless the deceased person had already submitted a return *See* however dicta in *Govind Saran* v *Commissioner of Income tax*,[21] in which it was suggested that, if tax is payable by a deceased person's estate, such estate is also entitled to a refund As to the circumstances in which a deceased person's estate may be liable to income tax, *see* notes under section 46

(21) 105 I C 596

See also the decision of the Patna High Court in the case of the *late Maharajadhiraj of Darbanga* in which they held that the heirs of an assessee were entitled to any refund that may arise as a consequence of a reference to the High Court made at the instance of the deceased That ruling, however, does not apply to refunds under sections 48 and 49

Appeals—

There is no appeal in respect of applications for refunds As regards points of law arising out of such applications, *see* notes under section 66 (1)

False applications for refunds—

As regards the penalty for such false applications, *see* notes under section 52

Income accumulated under trusts—

The most common type of such income is that of trustees administering trusts on behalf of minors The first point is whether such trusts could be treated as "associations of individuals" If so, there is no difficulty If not, and if no part of the income is being expended on the maintenance and education of the minors, they have no present income from the trust funds, and neither they nor anyone on their behalf can claim a refund under section 48 (3) That sub section allows the "owner" of investments to claim refund In a sense, the trustees are owners of the investments, but they have no beneficial interest in the income They would not be allowed to claim a refund of British tax in the United Kingdom as if they were beneficially interested, but special provision is made under section 25 of the British Act of 1918 to deal with such trusts The English Act like the Indian Act makes trustees liable for the tax in some cases, but *both* Acts are primarily designed to tax the persons beneficially interested behind the trustees though it is not always the beneficiary that is taxed *See* notes under section 40 It would seem to depend on the nature of the trust in each case whether the trustee or the beneficiary should be given the refund The person who is taxed should apparently also get the refund

Cumulative refunds under sections 48 and 49—

As to whether refunds can be granted cumulatively under both sections 48 and 49, *see* notes under section 49

Dividends free of tax in the United Kingdom and India—

If a dividend is paid free both of the United Kingdom and the Indian Income tax, the total income for the purpose of section 48 cannot include United Kingdom income tax Section 16

authorises the inclusion of Indian Income tax only. The fact that for relief under section 49 the United Kingdom tax is not deducted in computing the income eligible for relief does not affect the issue. What the shareholders receive is only a net dividend. There is no 'agency' as between the company and the shareholder, and in the absence of a provision as in section 16 which expressly authorises the income tax to be added, the total income of the shareholder must be computed on the basis of his actual income without crediting him with notional receipts not authorised by the Act. If, however, a dividend is paid subject to United Kingdom Income tax, it is the gross dividend that should be taken into account.

United Kingdom Law—

In the United Kingdom, there is no provision corresponding to section 48 of the Indian Act. Relief is claimed by assessees, and granted either by adjustment during assessment or by refund or by both. The right of a shareholder to refund on account of the tax paid by the company on his dividends rests on judicial pronouncements and not on any express provision as in India.

In *Gimson* v *Inland Revenue*[22] it was argued by the Revenue that a dividend from a company was in itself a tax bearing subject matter, that it did not merely represent the division to the shareholder of a fund that had borne tax in the hands of the company and that, therefore, as a consequence of the companies being taxed on some peculiar measure of income, the shareholder's income from dividends might exceed or fall short of the corresponding income of the company. This view was negatived by Rowlatt, J. The result of the Crown's claim would be that a man with a small income would get back tax which the Revenue never had, representing sums which did not exist at all. The correct view was that the shareholder could get back tax only on what he has actually suffered tax and be taxed (to super tax) on a similar sum.

Despite the difference between the scheme of the Indian Act and that of the United Kingdom Acts, the principle enunciated above seems to be capable of extension to the Indian Act also, in so far as there is any ambiguity in sections 48 and 49.

49. If any person who has paid Indian income-tax for any year on any part of his income proves to the satisfaction of the Income-tax Officer that he has paid United

Relief in respect of United Kingdom income tax

(22) 9 A. T. C. 17)

Kingdom income-tax for that year in respect of the same part of his income, and that the rate at which he was entitled to, and has obtained, relief under the provisions of section 27 of the Finance Act, 1920, is less than the Indian rate of tax charged in respect of that of his income, he shall be entitled to a refund of a sum calculated on that part of his income at a rate equal to the difference between the Indian rate of tax and the rate at which he was entitled to, and obtained, relief under that section

Provided that the rate at which the refund is to be given shall not exceed one-half of the Indian rate of tax

(2) In sub-section (1)—

(*a*) the expression 'Indian income-tax' means income-tax and super-tax charged in accordance with the provisions of this Act ,

(*b*) the expression "Indian rate of tax means the amount of the Indian income-tax divided by the income on which it was charged ,

(*c*) the expression "United Kingdom income-tax means income-tax and super-tax chargeable in accordance with the provisions of the Income-tax Acts

Rule 40 An application for refund of income tax under section 49 of the Act shall be made in the following form —

Application for relief from double income tax under section 49 of the Indian Income tax Act, 1922

I ——————————— of ——————— do hereby state that I have paid United Kingdom income tax and super tax amounting to £—————— for the year ending 19———— on an income of £—————— and that Indian income tax / income tax and super tax of Rs ——————————— has also been paid on the same income / income from the same source amounting to Rs ——————— I have obtained relief under the provisions of section 27 of the English Finance Act, 1920, at the rate of ——————— see attached certificate from the Inspector of Taxes——————— I now pray for a further relief at the rate of ——————— amounting to Rs ——————— under section 49 of the Indian Income tax Act, 1922, to which I

am entitled My income from all sources to which this Act applies during the "previous year" ending on the———19——— amounted to Rs.——————only——————*see* Return of Income $\frac{\text{attached}}{\text{already submitted}}$.

Signature——————

I hereby declare that what is stated herein is correct.

Signature——————

Dated——————19 .

Rule 41 The application under rule 36 or rule 40 may be presented by the applicant in person or through a duly authorised agent or may be sent by post.

History—

The arrangement regarding Double Income-tax Relief is more complicated than it appears to be at first sight as will be seen from the paragraphs of the Income-tax Manual reproduced below It is based on the recommendations of the Royal Commission on Income-tax in the United Kingdom (1920) There was no arrangement for Double Income tax Relief in India before 1922

Indian States—

As regards similar relief in respect of income taxed both in British India and in the Indian States, *see* Notifications under section 60

Relief from double income-tax—

(*Section* 49) —At a conference between the representatives of the Home Government and of the Dominions and of India an agreement was arrived at to the following effect That in respect of income taxed both in the United Kingdom and in India there should be deducted from the appropriate rate of the United Kingdom Income-tax (including super-tax), the whole of the rate of the Indian Income tax (including super-tax), charged in respect of the same income subject to the limitation that in no case should the maximum rate of relief given by the United Kingdom exceed one half of the rate of the United Kingdom income-tax (including super tax) to which the individual tax payer might be liable and that any further relief necessary in order to confer on the tax payer relief amounting to the lower of the two taxes (United Kingdom and India) should be given by India That is to say, the arrangement is that where income is liable to taxation both in the United Kingdom and in India) it should pay only at the highest rate leviable in either country These proposals have been accepted by the Government of the United Kingdom, and are embodied in section 27 of the Finance Act of 1920 A copy of that section is given below

• • • •

27 (1) If any person who has paid, by deduction or otherwise, or is liable to pay United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he *shall be entitled to relief from United Kingdom income tax* paid or payable by him on that part of his income at a rate thereon to be determined as follows —

(*a*) if the Dominion rate of tax does not exceed one half of the appropriate rate of United Kingdom tax, the rate of which relief is to be given shall be the Dominion rate of tax,

(*b*) in any other case the rate at which relief is to be given shall be one half of the appropriate rate of the United Kingdom tax

For the purpose of this section, the expression "the appropriate rate of United Kingdom tax" means the rate at which the claimant for the year to which the claim relates has borne or is liable to bear United Kingdom income tax and where the claimant is liable to United Kingdom super tax the expression "the appropriate rate of United Kingdom tax" means a rate equal to the sum of the rates at which he has borne or is liable to bear United Kingdom income tax and super tax, respectively, for that year

(2) Where a person has not established his claim to relief under this section for any year of assessment before the first day of January in that year, the relief shall be granted by way of repayment of tax

(3) Where by reason of the allowance of relief under this section the rate of United Kingdom income tax deducted from or paid in respect of any part of the income of any individual is less than the standard rate, and the rate of the relief so allowed is greater than the rate appropriate to the case of that individual, such an adjustment shall be made in allowing to that individual any relief to which he may be entitled under the provisions of this part of this Act relating to the rate of tax on the first two hundred and twenty five pounds of taxable income as may be necessary to secure that the amount of United Kingdom income tax finally paid or borne by him shall be equal to the amount which would have been paid or borne if the relief under this section had in the first instance been given at the rate appropriate to his case

(4) Notwithstanding anything in the Rules applicable to Case IV or Case V of Schedule D or in any other provision of the Income tax Acts, no deduction shall be made on account of the payment of Dominion income tax in estimating income for the purposes of United Kingdom income tax, and where income tax has been paid or is payable in any Dominion either on the income out of which income subject to United Kingdom income tax arises or is received, or as a direct charge in respect of that income, the income so subject to United Kingdom income tax shall be deemed to be income arising or received after deduction of Dominion income tax and an addition shall, in estimating income for the purposes of the United Kingdom income tax, be made to that income of the proportionate part of the income tax paid or payable in the Dominion in respect of the income out of which that income arises or is received together with the full amount of any Dominion income tax directly charged or chargeable in the Dominion in respect of that income

Provided that—

(*a*) where any income arising or received as aforesaid consists of dividends which are entrusted to any person in the United Kingdom for payment and the Special Commissioners are satisfied that the person so entrusted is not in a position to ascertain the amount of the addition to be made under this sub section, the assessment and charge may be made on the amount of the dividends as received by the person so entrusted, but in any such case the amount of the addition shall be chargeable on the recipient of the dividends under Case VI of Schedule D, and

(*b*) where, under the laws in force in any Dominion, no provision is made for the allowance of relief from Dominion income tax in respect of the payment of United Kingdom income tax, then in assessing or charging income tax in the

United Kingdom in respect of income assessed or charged to income tax in that Dominion deduction shall be allowed in estimating income for the purpose of United Kingdom income tax of an amount equal to the difference between the amount of the Dominion income tax paid or payable in respect of the income and the total amount of the relief granted from the United Kingdom income tax in respect of the Dominion income tax for the period on the income of which the assessment or charge to United Kingdom income tax is computed

In this sub section the expression 'dividends' includes any interest, annuities, dividends, shares of annuities, pensions, or other annual payments or sums in respect of which tax is charged under the Rules applicable to Schedule C or under Rule VII of the Miscellaneous Rules applicable to Schedule D

(5) Where under Rule 20 of the General Rules applicable to Schedules A, B, C, D and E, a body of persons is entitled to deduct income tax from any dividends, tax shall not in any case be deducted at a rate exceeding the rate of the United Kingdom income tax as reduced by any relief from that tax given under this section in respect of any payment of Dominion income tax

(6) Where under the law in force in any Dominion provision is made for the allowance of relief from Dominion income tax in respect of the payment of United Kingdom income tax, the obligation as to secrecy imposed by the Income tax Act upon persons employed in relation to Inland Revenue shall not prevent the disclosure to the authorized officer of the Government of the Dominion of such facts as may be necessary to enable the proper relief to be given in cases when relief is claimed both from United Kingdom income tax and from Dominion income tax

(7) The Commissioners of Inland Revenue may from time to time make regulations generally for carrying out the provisions of this section, and may, in particular by those regulations provide—

(a) For making such arrangements with the Government of any Dominion to which the last preceding sub section applies as may be necessary to enable the appropriate relief to be granted

(b) For prescribing the year which in relation to any Dominion income tax is, for the purposes of relief under this section, to be taken as corresponding to the year of assessment for the purposes of United Kingdom income tax

(8) In this section —

(a) The expression "Dominion" means any British possession, or any territory which is under His Majesty's protection or in respect of which a mandate is being exercised by the Government of any part of His Majesty's dominions

(b) The expressions "United Kingdom income tax" and "United Kingdom super tax" mean respectively income tax and super tax chargeable in accordance with the provisions of the Income tax Acts

(c) The expression "Dominion income tax" means any income tax or super tax charged under any law in force in any Dominion, if that tax appears to the Special Commissioners to correspond with United Kingdom income tax or super tax

(d) The expression "Dominion rate of tax" means the rate determined by dividing the amount of the Dominion income tax paid for the year by the amount of the income in respect of which the Dominion income tax is charged for that year, except that where the Dominion income tax is charged on an amount other than the ascertained amount of the actual profits the Dominion rate of tax for the purposes of this section shall be determined by the Special Commissioners

For the purposes of this section, the rate of United Kingdom income tax shall be ascertained by dividing by the amount of the taxable income of the person concerned the amount of tax payable by that person on that income before deduction of any relief granted in respect of life assurance premiums or any relief granted under the provisions of this section, and the rate of United Kingdom super tax be

ascertained by dividing the amount of the super tax payable by any person by the amount of that person's total income from all sources as estimated for super tax purposes

* * * *

Under that section, a person whose income is assessed both in the United *Kingdom* and in India is entitled to claim from the authorities of the United Kingdom a refund or rebate of the rate levied in India up to one-half of the English rate.

Section 49 of the Indian Income-tax Act, therefore, provides that where any further relief is to be given in order to secure that such a person shall not pay a higher rate than the highest rate in either country, such relief will be given by India, subject to the limitation that the relief given in India shall not exceed half of the rate of income-tax and super-tax combined Relief can only be claimed in India, when, owing to any alteration in the rates, the Indian rate is more than half the English rate, and the amount of relief would merely be the amount by which the Indian rate exceeds half the English rate. The rates prescribed in India in some cases now amount to more than half the English rates as fixed for the year 1926-27. The table below shows the amount of English income-tax and super tax and the effective rate per rupee contrasted with similar figures for the Indian rates.

ENGLISH.				INDIAN.		
Income.	Income-tax.	Super-tax.	Effective rate per rupee.	Income-tax.	Super-tax.	Effective rate per rupee.
RS	RS.	RS. A.	A. P.	RS.	RS.	A. P.
30,000	6,000	..	3 $2\frac{2}{5}$	2,343	..	1 3
45,000	9,000	656 4	3 $5\frac{1}{5}$	4,218	..	1 6
60,000	12,000	1,781 12	3 $8\frac{1}{10}$	5,625	625	1 8
75,000	15,000	3,468 12	3 $11\frac{7}{25}$	7,031	1,562	1 10
90,000	18,000	5,718 12	4 $2\frac{3}{5}$	8,437	2,500	1 $11\frac{1}{3}$
1,05,000	21,000	8,343 12	4 $5\frac{23}{35}$	9,844	3,594	2 $0\frac{4}{7}$
1,20,000	24,000	10,968 12	4 $7\frac{19}{20}$	11,750	5,000	2 2
1,35,000	27,000	13,968 12	4 $10\frac{4}{15}$	12,556	6,406	2 $3\frac{1}{8}$
1,50,000	30,000	16,968 12	5 $0\frac{3}{25}$	14,062	7,812	2 4
2,25,000	45,000	33,843 12	5 $7\frac{7}{25}$	21,094	17,969	2 $9\frac{1}{3}$
3,00,000	60,000	52,593 12	6 $0\frac{3}{50}$	28,125	31,250	3 2
4,50,000	90,000	93,843 12	6 $6\frac{11}{25}$	42,187	68,750	3 $11\frac{1}{3}$
6,00,000	1,20,000	1,38,843 12	6 $10\frac{83}{100}$	56,312	1,20,312	4 $8\frac{1}{2}$
COMPANIES.	..	..	3 2·4	..	..	2 6

NOTE.—The allowances and abatements allowed by the United Kingdom Income-tax Act have not been taken into account in working out the figures of United Kingdom Income-tax in the table. The Income tax and Super tax have also been

assumed to be charged on the same income The figures are therefore only useful as generally indicating the relative rates of taxation in the two countries

It will be observed that the rate for individuals and firms is less than half the English rate up to an income of about 3 lakhs Persons with such incomes which are wholly taxed both in the United Kingdom and in India can, therefore claim a refund or rebate of the whole of the Indian rate to be set against the English rate from the authorities in England The English rate for an income of 4 1|2 lakhs is just over 6 annas and 6 pies and a person who has paid income tax both in the United Kingdom and in India on an income of 4 1|2 lakhs could claim a refund from the English authorities of a sum equivalent to 3 annas 3 11|50 pies per rupee on his assessed income and thereafter could claim from the Indian income tax authorities a refund of 8 17|50 pies per rupee of his assessed income An assessee must have obtained relief from the authorities in the United Kingdom and must prove that he has done so and at what rate the relief was granted before any relief can be given to him in India

It is necessary to emphasise the fact that the relief under this section *proceeds and is based upon a comparison of the rate* of tax in India with the *rate* of tax in the United Kingdom and not of the comparative *amounts* of tax paid in either country That is to say what is compared is the rate of the Indian tax paid by the claimant for the Indian year of assessment corresponding to the United Kingdom year of assessment in respect of the part of the claimant's income liable to United Kingdom tax and not the particular amount of such part of his income liable to United Kingdom income tax as is charged to Indian income tax The rate of Indian income tax paid in respect of the part of the income in question having been ascertained the relief from United Kingdom income tax is granted on that part of the income as is charged to United Kingdom income tax for that year of assessment irrespective of the fact that the amount of the United Kingdom assessment may be greater or less than the amount of the Indian assessment for the corresponding Indian year of assessment or that the amount of relief may fall short of or exceed the amount of Indian tax actually paid In other words, under this system of relief no enquiry is made in the United Kingdom into any differences of basis of computation under the Indian and United Kingdom rules of assessment, provided that it is clear that from whatever source he derives the income on which he claims relief, the claimant has paid (for the Indian year of assessment corresponding to the United Kingdom year of assessment for which relief is claimed) Indian tax in respect of his income from that source, however that income may have been computed for the purposes of assessment to the Indian tax, and the procedure in India in determining the balance of relief to be given in this country proceeds in exactly the same way For example, suppose a man resident in the United Kingdom trades in India and is liable to United Kingdom income-tax in respect of the profits on a three years' average and to Indian income tax on a preceding year's basis, suppose also (ignoring other expenses) that the Indian Act allows as a deduction the payment of annual interest on money borrowed which is not allowed in the United Kingdom, and that his profits for the years 1 to 4 are as follows—

Number	Profits before deduction of annual interest	Annual interest
	Rs	Rs.
1	1 00 000	3 000
2	50 000	6,000
3	[illegible]0 000	2,400
4	70 000	5,000

The United Kingdom and Indian assessments for the years 4 and 5 are as follows —

Figures	United Kingdom assessment	United Kingdom rate (say)	Indian assessment	Indian rate (say)
	Rs		Rs	
4	60 000	4s 4	27 600	A 1
5	50 000	5s 4½d	65 000	A 1 19/26

Then relief from United Kingdom income tax will be allowed at 1 anna on Rs 60,000 for the year 4 and 1 19/26 annas on Rs 50,000 for the year 5 There will be no claim to any relief in India

This system of relief is one that was deliberately adopted at the conference the principle followed being summarised as follows in the report of the United Kingdom Royal Commission, viz —

"That there will be no interference either by the United Kingdom or by a Dominion with the basis of assessment adopted by any other part of the Empire and further that the settlement should be independent of increases and decreases in rate of tax and alteration in the basis of assessment whether in the United Kingdom or in the Dominions This intention is clearly illustrated by the following examples which are given in the report

Example 1 —A, a British resident, derives a fluctuating unearned income directly from a Dominion whose rate of tax applied to that income is 1s. 6d in the £. A has no other income and his rate of tax in the United Kingdom varies according to the amount of his income The following figures illustrate the position —

	United Kingdom	Dominion
1st year		
Tax before relief	£1 000 at 3s 9d	£600 at 1s 6d
Relief	£1 000 at 1s 6d	Nil
Tax after relief	£ 1000 at 2s 3d	£600 at 1s 6d

	United Kingdom	Dominion
2nd year		
Tax before relief	£300 at 3s 0d	£900 at 1s 6d
Relief	£300 at 1s 6d	Nil
Tax after relief	£300 at 1s 6d	£900 at 1s 6d

In this example, although it was the same description of income assessed each year there were wide variations in the amounts assessed in the United Kingdom and in the Dominion This might happen owing to different methods of computing taxable profit, and the differences are intentionally exaggerated to illustrate the principles to be followed

Example 2—B is a British resident receiving as shareholder an income of £900 from a British Company C which derives the whole of its income from a Dominion In the first place relief will be given to the Company C, and in order to illustrate how this is done, let it be assumed that the Company's profits as calculated for the United Kingdom tax are £60 000, and as calculated for Dominion tax £50,000 Adjustment will be made to the Company as follows —

	United Kingdom	Dominion
Tax before relief	£60 000 at 6s 0d	£50,000 at 1s 6d.
Relief	£60 000 at 1s 6d	Nil
Tax after relief	£60 000 at 4s 6d	£50 000 at 1s 6d

The Company when paying the dividend to B would deduct 4s 6d in the £ United Kingdom tax and intimate on the dividend warrant that the relief in respect of Double Income tax was 1s 6d in the £

Let it be assumed that B's dividend of £900 is his total income, so that his proper rate of charge to United Kingdom income tax is 3s 9d He has suffered Dominion tax to the extent of 1s 6d in the £, and his ultimate rate of United Kingdom income tax is 2s 3d in the £ (3s 9d. less 1s 6d), but he has suffered by deduction 4s 6d in the £ and he will accordingly be repaid 4s 6d minus 2s 3d equal 2s 3d. in the £ on £900

Example 3—D is a British resident receiving £900 from Company C, but he has other income arising in the United Kingdom, and his combined rate of income tax and super tax is 7s 6d in the £ He is entitled, therefore, to Double Income tax relief up to a maximum of 3s 9d but the whole of the Dominion tax (1s 6d in the £) has already been allowed to the Company C, who deduct 4s 6d United Kingdom tax on payment of the dividends, and no further relief is due D will, therefore, be assessable in respect of the £900 at 1s. 6d in the £, *viz*, 7s 6d less 4s 6d. United Kingdom tax deducted, and 1s 6d Dominion tax

It will be noted that in the table, the amount of relief which a company can get under the English Act is at the rate of 2 annas in the rupee and that the amount which they can claim from the Indian authorities will be at a rate of 6 pies in the rupee The reason for the comparative high rates in India as compared with the United Kingdom of the tax on companies is that the Indian rate includes the super tax on companies while

the English rate does (did) not include the United Kingdom Corporation tax At the same time, it must be noted that the Indian rate of 2 annas and 6 pies given in the table for companies is a rate which in actual practice will never be reached. It includes the 1 anna and 6 pies income tax rate and the flat rate of 1 anna for super tax, but the flat rate of 1 anna is never charged on the whole of the assessable income but only on the portion of the income in excess of Rs. 50,000 The rate for the portion of the income below Rs 50,000 is *nil* In order to get at the comparative rate, the tax paid by the company has to be divided by its total income Thus, in the case of a company with a profit of 1 lakh the comparative rate would *merely* be 2 annas while the rate in the case of a company with a profit of 2 lakhs, it would merely be 2 annas and 3 pies In the former case, full relief would be obtainable in the United Kingdom and *no* relief should be claimed in India while in the latter case a relief of 2 annas in the rupee would be obtained in the United Kingdom and of 3 pies in India (These rates relate to a period when the United Kingdom rate of income tax was 5s in the £).

In order to obtain relief in India a claimant is required to supply the official receipt for the United Kingdom income tax paid, the notice of assessment in particular showing the basis on which the liability has been computed and a certificate of the Income tax authorities showing what relief has actually been granted to him in the United Kingdom

The following are further examples illustrating the method to be adopted in calculating relief due under section 49 of the Act —

Example 1—A, a married man with one child, is resident in the United Kingdom he has a fixed income of Rs 10,500 from property in India and has no other income His liability to tax is —

In the United Kingdom		Rs A. P	In India
Assessable income		10,500 0 0	Income tax on Rs. 10,500 at 9 pies in the rupee Rs 492 3 0
Less Personal allowance	Rs 3,375		
Deduction for child	" 540	3,915 0 0	
Taxable income		6,585 0 0	
Tax on the 1st Rs 3,375, at As 2 in the rupee		421 14 0	
Tax on balance Rs 3,210 at As 4 in the rupee		802 8 0	
[23]Total tax (before relief in respect of Indian income tax)		1,224 6 0	

(23) For the purposes of calculating "the appropriate rate of United Kingdom tax" this amount is not to be reduced by any relief granted in respect of any life assurance premium

The United Kingdom tax (Rs 1,224 6 0), divided by the taxable income (Rs 6,585) gives an "appropriate rate of United Kingdom tax" of approximately 2 annas 11 7 pies A has paid Indian income tax in respect of the same income at a rate of 9 pies in the rupee, that is, a rate which is less than half the United Kingdom rate and the relief from United Kingdom tax will, therefore, be a sum equal to the Indian rate on Rs 6 585

Example 2 —B is a bachelor, resident in the United Kingdom with no dependants, and has an earned income of £1,000 assessable to United Kingdom income tax He has no other income and pays income tax in India in respect of the income in question His liability to tax is as follows —

	United Kingdom		
	£	s	d
Total income	1,000	0	0
Less earned income allowance one tenth of £1,000	100	0	0
Assessable income	900	0	0
Less Personal allowance	135	0	0
Taxable income	765	0	0
Tax on 1st £225 at 2*s* 6*d*	28	2	6
Tax on balance £540 at 5*s*	135	0	0
[24]Total tax (before relief in respect of Indian income tax)	163	2	6

The tax (£163 2 6) divided by the taxable income (£765) gives an ' appropriate rate of the United Kingdom tax" of 4*s* 3 2*d* or 3 41 annas in the rupee, Indian income tax is payable on this income at a rate of 9 pies in the rupee, so that B is entitled to get relief from the United Kingdom at the rate of 9 pies in the rupee (that is, 11*d* in the pound) on £765 and there is no balance of relief to be given in India

Example 3 —C is a Company the whole profits of which are taxed both in the United Kingdom and in India The Indian rate of tax paid by the company is 2 annas and 3 pies in the rupee while the "appropriate rate of United Kingdom tax" for the company is 5*s* in the pound The company can get relief at the rate of 2|6 in the pound (or 2 annas in the rupee) in the United Kingdom and on proof of payment of United Kingdom tax and of the grant of United Kingdom relief can claim from the Income tax authorities in India the balance of relief, namely, 3 pies in the rupee

Corporation Profits Tax paid in the United Kingdom should not be deducted from the income taxed in India for the purpose of calculating the relief claimed under section 49

(24) For the purposes of calculating "the appropriate rate of United Kingdom tax" this amount is not to be reduced by any relief granted in respect of any life assurance premium

This section merely provides for relief from double tax where the same income is assessed to tax both in the United Kingdom and in India It does not provide for relief in other cases (*Income tax Manual*, para 93)

The rates given in the examples above and below are all merely illustrative.

Relief from double tax of incomes taxed in British India and in the United Kingdom—Method of calculating relief in India —The following method should be followed in calculating the "Indian rate of tax" as defined in section 49 (2) (*b*) of the Indian Income tax Act —

"Doubly charged" income should be divided into different parts, *viz*, (*a*) that which bears income tax or super-tax only, (*b*) that which bears both super tax and income tax, and (*c*) that which bears neither, and relief should be calculated separately on parts (*a*) and (*b*) As far as possible the part of income charged to income tax only and the part charged to super tax only should run "concurrently", so that in effect there will ordinarily be only two parts to take into account, *viz*, the part charged either to income tax or to super tax and the part charged to both This is illustrated by the following example —

Example —Let the assessee be a company and one lakh of rupees be the income subject to double income tax The income is divided into two parts—

(*a*) liable to income tax only, Rs 50,000,

(*b*) liable to both super tax and income tax, Rs 50,000

No relief will be allowed in India on (*a*) as the United Kingdom authorities will grant relief at 1 5 annas in the rupee—the entire income tax paid in India—which is less than half the English rate of tax, while relief of 9 anna per rupee will be admissible on (*b*) that is, *the total* relief in India would be 45,000 annas (*Income tax Manual*, para 93 A)

The same practice should be applied to cases of individuals also, but the income charged to super tax should not be divided into separate "slabs" and a computation made for each slab separately, but the income liable to super tax should be considered as a whole and a single *rate worked out*

Payment of tax in instalments—

The following procedure should be followed for the grant of relief in respect of double taxation in India and in the United Kingdom —

When during an assessment it is known that an assessee will be entitled to relief on account of double taxation on any part of his income, the amount of the relief may be calculated by the Income tax Officer so far as is possible, and the assessee may be allowed to pay the demand in two instalments, the second of which will represent the amount of relief calculated to be due The date of the first instalment will be that ordinarily fixed for the payment of a demand of income tax, while the second will be payable two or, if possible, three or four months from the date of the notice of demand If the assessee produces the necessary British certificates and establishes his claim to relief under section 49 of the Indian Income tax Act, 1922, the demand for the second instalment should be modified by cancellation or reduction or, if the relief is greater than

the second instalment and the first instalment has been paid a refund should be granted (*Income tax Manual*, para 94)

Proves to the satisfaction of the Income tax Officer—

The nature of the evidence must depend on the circumstances of each case and the discretion of the Income tax Officer, but the certificates of the Revenue Officers in the United Kingdom would ordinarily be accepted as satisfactory evidence by the Income tax Officer The onus of proof lies on the applicant *See* extract from paragraph 92 of the Income tax Manual, set out under section 48

Indian rate of tax—

The formula for arriving at the Indian rate of tax under section 49 (2) (*b*) of the Indian Income tax Act is not so clear as that for arriving at the 'appropriate rate of tax' under section 27 (1) of the English Finance Act of 1920 While under the latter, separate rates are first struck of super tax and income tax, and the two rates added together to form the appropriate rate of tax', under the Indian law, on the other hand, the 'Indian rate of tax' is ascertained by dividing the sum of the income tax and super tax paid by 'the income on which such tax is charged" The definition in section 49 (2) (*b*) gives rise to difficulty because the income on which income tax is charged is *not* the same as the income on which super tax is charged The best interpretation of the section appears to be to divide the sum of the income tax and super tax by either of the incomes on which income tax and super tax are respectively charged In view of the ambiguity and the rule of construction that favours the subject in doubtful cases, the assessee should, it might be argued, have his rate computed by the alternative method that favours him, but in most cases it would make no difference one way or the other, because what is gained by choosing a particular divisor will be automatically lost, the same divisor being the multiplier of the rate arrived at by choosing the particular divisor It is obvious that the relief will be allowed in respect of the same income as is chosen for arriving at the rate of Indian tax The only cases in which it might suit an assessee to claim a particular alternative are those in which the adoption of either alternative brings the Indian *rate* on either side of half 'the appropriate rate of tax' under the English Act It is only if the Indian rate is more than half the 'appropriate rate' of English tax that any claim at all can be made on the Indian Exchequer, and in the marginal cases indicated above, the assessee could, arguably, claim that the divisor used should be the lower of the two incomes on which respectively income tax and super tax are charged

Another possible but not easily tenable point of view is that it is only that portion of the income that bears both super tax and income tax that satisfies this definition, i e, the income on which such tax (income tax *and* super tax) is charged [sub section 2 (*a*) and (*b*)] In this view, the divisor would be the 'total income *minus* the portion not liable to super tax *minus* the portion exempt from income tax This view, which ignores the fact that and can be used in the sense of "and or or", is difficult to maintain, because it would deprive persons who have paid either income tax or super tax only of relief under this section

All these arguments only show the defective drafting of the section the framers of the section probably had in view merely total income under section 16 when they meant "income on which such tax is charged" but the words used do not bring out the idea at all

Any part of his income—

The word 'part has reference merely to the fact that only a part of the assessee s income is doubly taxed, the assessee also having income which is not taxable both in India and in the United Kingdom The expression also brings out the fact that the methods of computation of the doubly charged income may be different in the two countries Thus, in the United Kingdom, in respect of Schedule D, the average of three years' income was till recently, taxed, whereas in India what is taxed is the previous year s income Similarly the carry forward of losses is allowed in the United Kingdom but not in India The question whether the doubly taxed income should be split up into two or more parts according as whether the parts bear Indian income tax only or super tax only or both does not admit of an easy answer Formerly the departmental practice was not to so split up but latterly Indian practice has fallen in line with the United Kingdom practice of so splitting up

Shareholder or partner—Position of—

The position of a company or firm for the purposes of Double Income tax Relief is fairly clear, but not so the position of the shareholder or partner In the first place, it is arguable whether tax is paid' by the shareholder or partner A condition precedent to the grant of the relief is that the person has 'paid' Indian income tax It will be seen from the notes under section 14 that the company is not the agent of the shareholder (The position of a firm, however, is somewhat different) It cannot therefore be said that the shareholder has *paid* tax either directly or through an agent. See *Inland Revenue* v *Dalgety & Co* set

out under this section *post* In practice, however, shareholders are allowed relief under this section (though not in respect of company super tax), 'paid' being construed as equivalent to 'suffered'

In the second place, if as the result of relief under section 49 a company ultimately pays less than the maximum rate of income tax in India, should the relief to the shareholder under section 48 be restricted to the difference between the rate *actually* paid by the company and his personal rate, or be the difference between the maximum rate of income tax and the personal rate? Also, if the personal rate of tax of the shareholder is higher than the rate actually suffered by the company, can the excess relief be recovered from the shareholder? In the United Kingdom the law is clear, and provision is made for the recovery of such excessive relief, and also for giving credit to the shareholder only for such tax as has been actually borne by the company

See section 27 (3) and (5) of the Finance Act, 1920, set out *supra*

Unregistered firm—Partner in—

A partner in an unregistered firm does not, it is submitted, pay income tax within the meaning of this section It is the firm that pays the tax and not the partner In a registered firm, of course each partner is ultimately separately assessed, and in a company also, the shareholder is similarly assessed But, in an unregistered firm, the partner's share of the profits is not taken into account at all in assessing the partner except in fixing the rate of tax for his other income

Double Income tax Relief—Should company pass on relief to share holder—Preference shareholders—Right of—

In *Rover* v *South African Breweries*[25-26] it was held by Astbury, J that a company that had obtained relief from Double Income tax (under section 43 of the Finance Act of 1916) could deduct tax from its dividends only at the rate at which the company actually suffered the United Kingdom tax, *i e* after reducing it by the tax refunded, and this principle was to be applied both in respect of ordinary shares and preference shares In 1919, however, the Scottish Court of Session held in *The New Zealand and Australian Land Co* v *The Scottish Union and National Insurance Co* [27] that in paying a *preference* dividend the company could deduct the entire rate of United Kingdom tax, it being held that a preference shareholder was not entitled to share

(25-26) (1918) 2 Ch 233
(27) 57 Sc. L. R 15

in any relief obtained by the company on account of Double Income tax

In the Finance Act of 1920 a definite provision was made [section 27 (5)] to the effect that a company must restrict its deduction of tax (no matter what the class or nature of dividends) to the net rate of United Kingdom tax which in fact the company had suffered Meantime the House of Lords had confirmed the decision of the Scottish Court [28] overruling Astbury, J's judgment

In *Wakefield v Whiteaway Laidlaw & Co* [29] the company had issued preference shares, shortly after the decision in the South African Breweries case subject to an express stipulation that the shares would bear United Kingdom tax at the *full* rate It was argued on behalf of the company (1) that the amendment of the law in 1920 contemplated a different set of circumstances from those in the New Zealand, etc, Company case, and that therefore the House of Lords' decision was not obsolete, and (2) in any case the amendment could not retrospectively affect the express stipulation between the company and the preference shareholders that the latter should pay the *full* rate of tax Mr Justice Sargant gave a decision in support of the company on the first contention and expressed no opinion on the second The point was again raised in *Sheldrick* v *South African Breweries*[30] in which the Court of Appeal decided that Sargant J s judgment was wrong

The position therefore is that in the United Kingdom at present a company receiving Double Income tax Relief must pass the relief on to the shareholder, whatever the nature of the share

In India however, in the absence of an express provision corresponding to section 27 (5) of the British Finance Act of 1920, the above decision cannot be automatically extended and the rights of preference shareholders would seem to depend on their contractual rights See *Purushottamdas Harkisandas v Central India Spinning, etc, Co* [31] which however was decided under the 1886 Income tax Act In the absence of special contractual rights, it is submitted that the position of preference shareholders in this respect is the same as that of ordinary shareholders that is, neither are entitled to be passed on the relief obtained by the company The ordinary shareholders, no doubt, benefit by whatever swells the profits of the company that are available for dis

(28) (1921) 1 A C 172
(29) 37 T L R 569
(30) (1923) 1 K B 173
(31) 1 I T C 11

tribution, but they cannot claim that the dividends should be increased by the relief obtained from the Government on account of Double Income tax

It was held in *Commissioners of Inland Revenue* v *Dalgety & Co*,[32] that a company is entitled to double income tax relief under section 27 of the English Act of 1920 on its taxable income even though it was entitled to recover tax on debenture interest 'Paid' means 'paid'—not effectively paid or borne

United Kingdom Law—

With effect from 1929 30 super tax was replaced by a sur tax in the United Kingdom As before it is levied on individuals only and it continues to be administered by the Special Commissioners The equivalent of the old combined income tax and super tax is now made up of two parts—one, the Income tax proper, at a 'standard' rate instead of at a single rate as before, and the other, in respect of incomes over a prescribed limit, at a certain rate or rates in addition to the standard rate The tax at the standard rate is deemed to be a first instalment of the combined tax, and the difference between the total tax and this instalment is known as sur tax and paid next year as a deferred instalment of income-tax There is really not much difference in effect between the old system and the new, except that the new system makes persons pay sur tax for as many years as they have earned profits, whereas formerly they did not pay super tax in the first year in which they earned the profits making them liable to the tax, and often escaped to some extent in the last year—by death, etc

As will be seen from the notes under section 3 regarding the existence of the source of income during the year of assessment, the old super tax in the United Kingdom was, like the Indian income tax and super tax, a retrospective tax on the previous year's profits, whereas the United Kingdom income tax was a tax on the current year's profits—computed conventionally with reference to past profits in different ways according to the circumstances of each case Now, both income tax and super tax, that is, the sur tax will be levied on the same basis in the United Kingdom

Consequential amendments have been made in section 27 of the Finance Act of 1920 by section 2 of Part II of the Fifth Schedule of the Finance Act of 1927 substituting sur tax for super tax The following provisions about Double Income tax relief in that Act are however new —

(32) 98 L J K B 542, 45 T L R 536

Relief from United Kingdom income tax in respect of Dominion income tax shall not be taken into account in computing sur tax, but shall be given from income tax charged or chargeable at the standard rate—section 42 (6), *Finance Act*, 1927

The various personal allowances will be subject to adjustment which will take into account Double Income tax relief—section 40 (1) *ibid*

Where a person has received Double Income tax relief, the deduction on account of the first £225 (or one half of the taxable income after deduction of personal allowances, if that one half is less) will not be less than if no Double Income tax relief had been given but if the Double Income tax relief has been greater than warranted by the person's appropriate rate of tax, the difference will be recovered from him under section 27 (3) of the Finance Act of 1920—section 42 (2), *ibid*

With the replacement of the super tax by a sur tax in the United Kingdom, section 49 of the Indian Act probably requires formal amendments

50 No claim to any refund of income-tax under this Chapter shall be allowed, unless it is made within one year from the *last* day of the year in which the tax was recovered, or before the last day of the financial year commencing after the expiry of the previous year, as defined in clause (11) of section 2 in which the income arose on which the tax was recovered, whichever period may expire later Provided that a claim to refund under section *49 may be* admitted after the period of limitation herein prescribed when the applicant satisfies the Commissioner, or an Assistant Commissioner of Income-tax specially empowered in this behalf by the Central Board of Revenue that he had sufficient cause for not making the claim within such period

Limitation of claims for refund

Limitation—How applied—

The limitation in this section applies only to the date of the claim by the assessee Once the claim has been admitted, it is not necessary that the refund should actually be paid within the period fixed under this section Even if it is not conceded that

the money in respect of an admitted claim is merely held by the Income tax Officer in deposit, i e, in a semi fiduciary capacity, and that there can be no limitation as to the period of payment, there seems little doubt that the limitation should be three years —under the Limitation Act—from the date on which the claim has been admitted A claim would be in order if presented on the very last day on which the year prescribed in this section expired

History—

In the 1918 Act, the claim had to be made within one year from the last day of the year to which "the claim relates" The present wording is more precise There was no such provision in the 1886 Act, but when refunds were first provided for in 1916, this period of limitation also was provided

The words after 'recovered' including the proviso were inserted by Act XXII of 1930

United Kingdom Law—

The corresponding period in the United Kingdom is 6 years (three years formerly) The Royal Commission of 1919 suggested that the period of limitation in this respect should be the same as under the ordinary law When this period was increased to 6 years, the period within which supplementary assessments can be made was also raised from 3 to 6 years In India, the period of limitation is roughly one year either way—*see* section 34

Recovered—Meaning of—

It was argued in *Commissioner of Income tax* v *Binny & Co*[33] that 'recovered' meant a taking back of what had been given, and that consequently the word referred, in a claim under *section 49, to the repayment of the tax in the United Kingdom* This interpretation was not accepted, since a similar meaning would make no sense in reference to a claim under section 48 to which section 50 equally applied 'Recovered' is used in this section merely as meaning 'received by Government In other sections also it is used in senses not implying any taking back of what has been given *See* for example, sections 18, 41 and 44 A.

Dividends of companies—

The question, *when* tax is recovered in respect of dividends from companies was raised in *Amratlal Gandhi* v *Commissioner*

(33) 2 I T C 466

of Income tax[34] in which the Bombay High Court ruled that tax is 'recovered' when the dividend is declared

In *Dhanbai Dadabai Kanga v Commissioner of Income tax*[35] the same High Court held that "the year in which tax was recovered" means the financial year in respect of assessees not maintaining accounts or those maintaining them by the financial year As regards others, the Court left the question open The principle of this decision has been partly incorporated in the statute now by the amendment made by Act XXII of 1930

Alternative periods of limitation—

As the section now stands, the words 'the year' which are used along with the words 'financial year' in the same section evidently refer to the calendar year *Cf* section 3 (59) of the General Clauses Act X of 1897 The alternative periods of limitation therefore are (*a*) one year from the end of the calendar year in which the tax was recovered, and (*b*) the last day of the financial year commencing after the expiry of the previous year, *i e*, the accounting year in which the income arose on which the tax was recovered The following examples illustrate the alternatives A dividend is declared in, say, January 1930, and the shareholder closes his accounts on the 30th September every year The first alternative gives him time till 31st December 1931 while the second gives him time till 31st March 1932 If on the other hand the shareholder closed his accounts, say, on the 28th February, the second alternative would take up only till the 31st March 1931 while the first would give him time till the 31st December 1931

Proviso—

The proviso was inserted in order to meet cases of hardship which were formerly dealt with under executive orders The Madras High Court drew attention to the need for this amendment when dealing with Binny & Co's case The Select Committee which considered Amending Act XXII of 1930 recommended that the Assistant Commissioner in outlying areas like Sind should be specially empowered to act under this proviso so as to reduce delay in the disposal of claims

Double Income-tax relief—Supplementary assessments—

Section 49 does not distinguish between original assessments and supplementary assessments under section 34 In the absence of such a distinction, an assessee is, it would appear, not

(34) 2 I T C 48
(35) 3 I T C 76

deprived of relief under section 49 if, otherwise, the supplementary assessment gives him a title to relief But his claim should be presented within one year from the last day of the year in which the tax on the supplementary assessment is recovered

Double Income-tax relief—Period of limitation—

If the person claiming relief has been assessed in British India the period of one year for the purpose of section 50 will run from the date of recovery of tax after the assessment notwithstanding the fact that a part of the income had been taxed at source on an earlier date But if the person has not been assessed and his entire income had been taxed at source, the period of one year would run from the date of taxation at source or of payment of dividend

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CHAPTER VIII

OFFENCES AND PENALTIES.

Failure to make payments or deliver returns or statements or allow inspection

51. If a person fails without reasonable cause or excuse—

(*a*) to deduct and pay any tax as required by section 18 or under sub-section (5) of section 46

(*b*) to furnish a certificate required by sub-section (9) of section 18 or by section 20 to be furnished ,

(*c*) to furnish in due time any of the returns mentioned in section 19-A, section 21, section 22 or section 38 ,

(*d*) *to produce, or cause to be produced, on or before* the date mentioned in any notice under sub-section (4) of section 22, such accounts and documents as are referred to in the notice ,

(*e*) to grant inspection or allow copies to be taken in accordance with the provisions of section 39,

he shall, on conviction before a Magistrate be punishable with fine which may extend to ten rupees for every day during which the default continues

Prosecution for offences—

Prosecution of assessees for offences under sections 51 and 52 cannot be commenced except at the instance of an Assistant Commissioner and the Assistant Commissioner is, under section 53, empowered to stay any such proceedings or compound any such offence The power of compounding an offence is one that can be exercised not only after proceedings have been commenced, but before proceedings are instituted at all (*Income tax Manual*, para 96)

History—

Clause (*b*) is new, and was introduced in 1922 In the Bill of 1922, as originally published, clause (*c*) was as below 'to deliver or cause to be delivered in due time any of the returns or particulars mentioned in sections " The Joint Select Committee altered the wording The reference to *Section 19 A* was inserted in 1926, when that section was inserted in the Act In the 1886 Act there was a provision enabling the Commissioner of the Division to remit wholly or in part any fine imposed under the section

Reasonable cause—

As to the meaning of 'reasonable cause or excuse', *see* notes under section 27 It is for the Magistrate to decide whether there has been 'reasonable cause or excuse' or not

Magistrate—

As to the meaning of 'magistrate', *see* section 2 (8) and notes on it Only certain Magistrates can try the offences under this Act

Fines—How levied—

A fine for a continuing offence cannot be levied prospectively

"The proper course seems to me to be to institute further prosecution, if there is occasion for it and allow the accused an opportunity of defending before the further fine is imposed—*per* Best, J, in *R* v *Veeramma*[36] (a case under a Municipalities Act) He could, of course, be convicted with having persisted in the failure only as regards the past, he could not be convicted of a failure in regard to the future"—*per* Heaton, J, in *R* v *Byramjee*[37] (a case under the Cantonment Act)

" The order for payment of so much fine per day so long as the building continues to stand is illegal The addition of such an order is premature There must be proof of a continuing offence

(36) 16 Mad 230
(37) 43 Bom 836

before the jurisdiction of a Magistrate to make such an order arises"—*per* Blair, J, in *R* v *Wazir Ahmad*[38] following *Ramkrishna Biswas* v *Mazumdar*[39] (which cites earlier cases), (a case under a Municipalities Act) "Clearly this necessitates a separate prosecution for a distinct offence—a prosecution in which a charge must be laid for a specific contravention for a specific number of days for which charge, if proved, the Magistrate is to impose a daily fine of an amount which is left to him in his discretion to determine The orders in the present case are bad as being conviction and punishments for offences which the accused persons had not committed, with which they were not and could not have been charged at the time the sentences were passed The effect of orders would be to deprive the accused persons of the opportunity to deny the commission of the offence or plead extenuating circumstances and to take away from the Magistrate, who might have afterwards to levy the fine, the discretion vested in him by law to determine the amount that should be inflicted after investigation of the case"—*per* Parsons and Ranade, JJ, in In re *Limbaji Tulsiram*[40] (a case under a Municipalities Act).

" The liability to daily fine in the event of a continuing breach has been imposed by the legislature in order that a person contumaciously disobeying an order lawfully issued may not claim to have purged his offence once and for all by payment of the fine imposed upon him for neglect or refusal to comply with the said order The liability will require to be enforced as often as the Revenue authority may consider necessary, by the institution of a second prosecution in which the question for consideration will be how many days have elapsed from the date of the first conviction under this section during which the offender is proved to have persisted in the offence and secondly the appropriate amount of daily fine to be imposed under the circumstances of the case, subject to the maximum of Rs 10 per day "

Per *Piggott, J*, in *Emperor* v *Amir Hasan Khan*,[41] ' A person cannot again be prosecuted for the continuance of the same offence before conviction nor can he be separately prosecuted for the continuance of the same offence for each day the offence is continued as a separate and distinct offence under that section before conviction '[42]

Effect of penal assessment—

A penal assessment under section 28 for false statement is no bar to prosecution for failing to produce accounts The two are different offences A penal assessment cannot be made because the account books are not produced It can be made only if the statements in the return are false, and if it is made,

(38) 24 All 309

(39) 27 Cal 565

(40) 22 Bom 766

(41) (1918) 40 A 569

(42) *Calcutta Corporation* v *Mattoo Bewah*, 13 Cal 103

it is a bar to a prosecution on that ground, *i e*, on the falsity of the return[43]

Service of notice—

A conviction under section 34 (*b*) of the Income tax Act, 1886 [partly corresponding to section 51 (*c*) of the present] was not maintained because there had been no formal service of notice as required by section 46 of the 1886 Act (corresponding to section 63 (1) of the present Act read with *section* 27 of the General Clauses Act X of 1897), the letter having been sent by ordinary post unregistered[44]

Imprisonment in default of fine—

The *question whether a Magistrate can sentence a person* to imprisonment in default of payment of fine imposed under the section does not appear to have been definitely decided In In re *Lal mia*[45] it was held that a penalty levied under a Municipalities Act is a 'fine', and that imprisonment in default of payment of fine was legal In *R* v *Rappel*[46] a case under a Town Nuisances Act, it was held that a Magistrate could sentence a defaulter to imprisonment On the other hand, in *R* v *Kuttappa*[47] and *R* v *Subramania Iyer*,[48] both cases under the Railways Act, it was held that the fact that excess charges were recovered like a fine by the Magistrate did not justify the imprisonment of a defaulter In *Basantakumari* v *Calcutta Corporation*,[49] a case under a Municipal Act, it was held that in that particular case, in which the penalty consisted of a lump fine in the first instance and a continuing fine for the period of continuance of the offence, the Magistrate could not impose a sentence of imprisonment in default of payment of fine But the Court avoided giving a general interpretation of section 25 *of the* General Clauses Act and the connected *sections in the Indian* Penal and Criminal Procedure Codes (sections 63 70, Indian Penal Code, and 386, *et seq*, Criminal Procedure Code), which govern the subject The position therefore is obscure, but the balance of argument would seem to be in favour of the view that section 25 of the General Clauses Act applies to fines under this section of the Income tax Act and that imprisonment can be

(43) *R* v *Hoosanelly & Co*, 1 I T C 48, 43 Mad 498
(44) *Emperor* v *Ramacharan*, 1 I T C 21
(45) 18 Bom 400
(46) 18 Mad 490
(47) 18 Bom 440
(48) 20 Mad 385
(49) 15 C W N 906

ordered It is doubtful however whether a case would ever arise, a person assessed to income tax is likely *ex hypothesi* to be in affluent circumstances and therefore in a position to pay Unless an assessee is deliberately contumacious, a case is not likely to arise

United Kingdom Law—

Section 55 of the United Kingdom Act, 1842 [sub-sections (1) and (3) of section 107 of the 1918 Act] enacted that "if any person who ought, by this Act, to deliver any list, declaration or statement as aforesaid, shall refuse or neglect so to do within the time limited in such notice" he shall be liable to a penalty, etc Section 52 [sub sections (1), (2) and (3) of section 100 of the 1918 Act] requires the assessee to deliver a 'true and correct' statement in writing of his income, etc

Inaccurate return—Liable to penalty—

A solicitor who had bought the business of another deceased solicitor for a consideration which included an annuity to the widow of the deceased married the widow and discontinued the annuity Nevertheless, he continued to show the annuity as a deduction from his income, as solicitor, in his income tax returns No fraud was alleged but it was considered that an inaccurate return furnished through negligence was liable to a penalty

Per *Lord Loreburn L C* — But I do not think it is true that an innocent mistake exposes a man to these penalties On the other hand the making of the return or statement is not always easy and mistakes may occur notwithstanding that care may have been used to avoid them, still more when proper care has not been used Accordingly provision is made for penalties which are to fall in the event either of unpunctuality or of inaccuracy in the return or statement required But alongside of that are found to be provisions to relieve a man from the penalty if he mends his mistake'

Per *Lord Atkinson* — (The law) provides that the person shall declare the truth of the statement and that the profits are fully stated upon every description of property appertaining to the declarant estimated to the best of his judgment and belief according to the directions and rules of the Act If in making this estimate he applies these rules and directions according to the best of his judgment or belief he is not liable to those penalties though he may have perchance fallen into error

I do not think there is anything in section 129 (Section 140 of the 1918 Act) inconsistent with this construction of section 100 (Section 207 and Fifth Schedule of 1918 Act)

Accordingly section 129 provides that when he discovers any defect or wrong statement in the statement he has delivered, he may correct it No doubt the words and such person shall not afterwards be subject to any proceedings by reason of such omission or wrong state

ment" would seem to suggest that the person would be liable if he had made a statement not true in fact, though true and accurate according to his belief, but I do not think this is enough to override the plain words of section 190 and the rules In this case, the question left to the jury was not framed precisely as it should have been They should in my opinion, have been asked whether, in their opinion, the respondent in making the return applied the Rules in the Schedule according to the best of his judgment and belief They have found . that he was guilty of negligence which I think must be taken to be a finding that he did not estimate his gains and profits to the best of his judgment and belief according to those rules

Per *Lord Gorrell* — It would seem therefore that section 55 was intended to impose penalties for breach of the duties imposed, and not merely for non delivery It may be that if a statement is made to the best of the declarant's judgment and belief according to the directions and rules of the Act he is not liable to a penalty merely because there is an innocent error or omission, but that is not the case before your Lordships where a return has been negligently made It is not necessary in my opinion to decide any such point in this case Moreover it is difficult to suppose that the Crown in such a case would seek to impose a penalty and even if the attempt were made the relieving section 129 would come into play [50]

In the above case both Lord Gorrell and Lord Shaw quoted with approval the following remarks of Lord Stormonth Darling[1] —

If a man were to put in a piece of blank paper and call it a statement or if he were to lodge a statement flagrantly and extravagantly different or incorrect then according to the argument of the Defender he would be exempt from prosecution, at all events under section 53 The reasonable reading of section 53 is that if there is a failure to deliver the kind of statement required by section 52 either by failure to deliver any statement at all or by delivery of a statement which is untrue or incorrect then the penalty is incurred "

Inaccurate return—Whether punishable in India—

Sections 22 (1) and (2) prescribe the obligation to furnish a return, the first in the case of companies to furnish a return on 15th June every year *suo motu* and the second on others, but in compliance with a notice to be issued by the Income tax Officer Rules 18 and 19 prescribe the forms of returns and the manner in which they shall be verified As in the United Kingdom, the person filing the returns here should certify that the return is correct according to the best of his knowledge and belief Under section 22 (3) mistakes can be rectified, and under section 51 (c) an inaccurate return not prepared to the best of the declarant's

(50) *Attorney General v Till*, 5 Tax Cases 440
(1) *Lord Advocate v Sawers* 3 Tax Cases 617

judgment and belief can apparently be penalised The fact that under section 52 a deliberately false return can be proceeded against under the Indian Penal Code does not affect this point In the United Kingdom also, a person can be indicted under the criminal law of the country for furnishing a deliberately false statement or return The failure under section 51 (*c*) is not only to furnish the return within the time but to furnish the kind of return contemplated by sections 19 A, 21, 22 and 38 A person could not put in a mere blank piece of paper as his return and seek to escape the penalty under section 51 (*c*) Similarly, he cannot put in a return which obviously is not prepared according to the best of his knowledge and belief and try to escape section 51 (*c*) In all such cases, of course, the *onus* would be on the Crown to prove that the offence had been committed

Prosecution—Neglect to deliver correct returns—Stigma of crime—

' If I thought that a judgment against the defender would affix upon him a stigma of crime then I should certainly be in favour of sending the case to a jury even though the amount involved is small, but I do not take the view that the result of an adverse judgment would be of that nature I think practically speaking it may leave the defendant's character uninjured [2]

False statement in declaration

52 If a person makes a statement in a verification mentioned in section 19-A or section 22, or sub-section (2) of section 26-A or sub-section (3) of section 30, or sub section (2) of section 32, or sub-section (2) of section 33-A which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be deemed to have committed the offence described in section 177 of the Indian Penal Code

History—

Corresponds to section 35 of the 1886 Act and section 40 of the 1918 Act The reference to section 19 A was inserted by Act XXIV of 1926 and the references to sections 26 A and 33 A by Act XXI of 1930

Scope of this section—

The provision in this section is without prejudice to that in section 476, Criminal Procedure Code, under which a 'Court' can direct a prosecution in respect of the offences mentioned in that

(2) *Per the Lord Ordinary in Lord Advocate v A B*, 3 Tax Cases 617

section and committed before the 'Court' All Income tax Officers, Assistant Commissioners and Commissioners are evidently 'Courts' for this purpose[3]

It is not necessary that there should be two parties arrayed as opponents in the matter to be decided by the officer The petitioner had a right that he should not be made to pay a heavier tax than was properly assessable on his income The officer had to decide as between the petitioner and Government what the petitioner's income was It is immaterial that in the appeal the Government would not be named as a respondent Suppose a trustee or a guardian of an infant makes an application to a Court for leave to sell certain properties of the beneficiary or the ward There might not be any respondent in the application yet it cannot be doubted that the order passed would be that of a Court [4]

The Divisional Officer has been empowered by Government to do justice between itself and the payer of an income tax on the question as to the extent of his liability to pay such tax and I am therefore clear that he is a Revenue Court The question who or what is a Court within the meaning of particular enactments is frequently a very difficult question and even the highest tribunals seem to be loth to give any definition which would be comprehensive and exhaustive [5]

False returns section 38 (names of partners beneficiaries etc) and under Rule 36 (Refunds)—

Section 52 does not refer to either of these two sections. As regards false returns under section 38, it is apparently open to the Income tax Officer as a Court to take steps to prosecute the offender under section 476, Criminal Procedure Code and section 177, Indian Penal Code, but as regards a false application under Rule 36 for a refund, the position is obscure In the first place, under section 37 an Income-tax Officer is not a Court for the purpose of section 48 which is outside Chapter IV in the second place, though the Income tax Officer is a 'public servant' it is not clear whether for the purpose of section 177, Indian Penal Code, it can be held that a claimant for refund is legally bound to furnish the information, etc, within the meaning of that section On the other hand, Rule 37 says that the application under Rule 36 shall be accompanied by a return of total income in the form prescribed under section 22, in this view therefore a return accompanying an application under Rule 36 is evidently a 'verification mentioned in section 22'', and a false statement therein can be punished under section 52

(3) See In re *Nataraja Aiyar* 36 Mad 72 and *Punamchand Manekial*, 45 Bom 64.

(4) Per *Sundara Aiyar* J in In re *Nataraja Aiyar* 36 Mad. 72.

(5) Per *Sadasiva Aiyar* J ibid

Jurisdiction—Magistrate—Who should try—

A person making a false verification in a statement under section 22 or 30 (3) can legally be tried under section 52 only by a court having jurisdiction over the place where the verification was made and not by a court having jurisdiction over the place where the Income tax appeal was presented[6]

Offence—When committed—

The offence under this section in respect of a return made under section 22 (2) is committed on the day on which the return is verified by the assessee A revised return filed under section 22 (3) cannot condone the offence under section 52 though it might mitigate it[6a]

Special Act—Construction in favour of subject—

"The person who is supposed to have made a false statement is certainly entitled to have set out the particular statement which is supposed to be false and before an action can be taken under section 193, Indian Penal Code it is necessary that that statement should be a statement made by a person who was legally bound to, on oath or by some express provision of law to state the truth or being bound by law to make a declaration upon any subject makes any statement which is false and which he either knows or believes to be false or does not believe to be true The law as ascertained in section 25 of Act II of 1886 lays down how these statements are to be verified and the Act being a Special Act it is to be construed in favour of the subject "[7]

Section 177, Indian Penal Code—

"Whoever, being legally bound to furnish information on any subject to any public servant as such furnishes as true information on the subject which he knows or has reason to believe to be false shall be punished with simple imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both,

or, if the information which he is legally bound to give respects the commission of an offence or required for the purposes of preventing the commission of an offence or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years or with fine or with both "

Illustrations

(*a*) *A*, a landholder, knowing of the commission of a murder within the limits of his estate wilfully misinforms the Magistrate of the district that the death has occurred by accident in consequence of the bite of a snake *A* is guilty of the offence defined in this section

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(6) In re *Malad n Pakkin Marakkayar*, I I T C 193 46 Mad 839
(6-a) *Ganga Sagar v Emperor* A I R 1929 All 919, 4 I T C 97
(7) Per Knox, J, in *Jagdeo Sahu v Rex*, 38 I C 993

(b) A, a village watchman, knowing that a considerable body of strangers has passed through his village in order to commit a dacoity in the house of Z a wealthy merchant residing in a neighbouring place, and being bound, under clause 5, section 7, Regulation III 1821, of the Bengal Code to give early and punctual information of the above fact to the officer of the nearest police station, wilfully misinforms the police officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain distant place in a different direction Here A is guilty of the offence defined in the latter part of this section

Explanation—In section 176 and in this section the word "offence" includes any act committed at any place out of British India, which, if committed in British India would be punishable under any of the following sections, namely, 302 304, 382, 392 393 394 395 396 397 398 399 402, 435, 436, 449, 450, 457, 458 459 and 460, and the word "offender" includes any person who is alleged to have been guilty of any such act

Prosecution to be at the instance of Assistant Commissioner

53 (1) A person shall not be proceeded against for an offence under section 51 or section 52 except at the instance of the Assistant Commissioner

(2) The Assistant Commissioner may stay any such proceeding or compound any such offence

Previous law—

This section corresponds to section 36 of the 1886 Act and section 41 of the 1918 Act The Assistant Commissioner now takes the place of the Collector These powers may not be exercised by any other authority, not even the Commissioner nor the Central Board of Revenue

Sub section (2)—

The power in sub section (2) is intended to save the harassment of persons, but no one can *claim* that the Assistant Commissioner should use this power in his favour It is a matter entirely within his discretion The power can be exercised *both* before and after proceedings under sections 51 and 52 have commenced It would be an abuse of this power to attempt to squeeze the maximum money possible out of the assessee by holding out a threat of prosecution [7a]

Scope of section—

The Assistant Commissioner's sanction is required only for the prosecutions referred to in sections 51 and 52 *Other* prosecutions started under section 476, Criminal Procedure Code, by the Income tax Officer, as a court, do not require the Assistant Commissioner's sanction

(7a) *Ganga Sagar* v *Emperor*, 4 I T C 97

United Kingdom Law—

Prosecutions are instituted at the instance of the assessing Commissioners, the administrative machinery for assessment in that country is so radically different from that here as already pointed out in the notes under section 5

Disclosure of information by a public servant

54 (1) All particulars contained in any statement made, return furnished or accounts or documents produced under the provisions of this Act or in any evidence given, or affidavit or deposition made, in the course of any proceedings under this Act other than proceedings under this Chapter, or in any record of any assessment proceeding, or any proceeding relating to the recovery of a demand, prepared for the purposes of this Act, shall be treated as confidential, and, notwithstanding anything contained in the Indian Evidence Act, 1872 no Court shall, save as provided in this Act, be entitled to require any public servant to produce before it any such return, accounts, documents or record or any part of any such record, or to give evidence before it in respect thereof

(2) If a public servant discloses any particulars contained in any such statement, return, accounts, documents, evidence affidavit, deposition or record, he shall be punishable with imprisonment which may extend to six months, and shall also be liable to fine

Provided that nothing in this section shall apply to the disclosure—

(*a*) of any such particulars for the purposes of a prosecution under section 193 of the Indian Penal Code in respect of any such statement, return accounts, documents, evidence, affidavit or deposition, or for the purposes of a prosecution under this Act, or

(*b*) of any such particulars to any person acting in the execution of this Act where it is necessary to disclose the same to him for the purposes of this Act, or

(*c*) of any such particulars occasioned by the lawful employment under this Act of any process for the service of any notice or the recovery of any demand, or

(*d*) of such facts to an authorised officer of the United Kingdom, as may be necessary to enable relief to be given under section 27 of the Finance Act, 1920, or a refund to be given under section 49 of this Act

Provided, further, that nothing in this section shall apply to the production by a public servant before a Court of any document, declaration or affidavit filed, or the record of any statement or deposition made in a proceeding under section 26-A, or to the giving of evidence by a public servant in respect thereof

Provided, further, that no prosecution shall be instituted under this section except with the previous sanction of the Commissioner.

History—

Corresponds to section 42 of the 1918 Act and section 38 (2) and (3) of the 1886 Act, and incorporates the recommendations of the All India Committee of 1921 The second proviso was inserted by Act XXI of 1930 in order to prevent the production of false partnership deeds before the Income tax Officer The words "section 193 of" in (*a*) of the first proviso were omitted by Act XXII of 1930 so as to permit disclosure in cases of all offences under the Indian Penal Code and not merely those under section 193

Income-tax records to be kept confidential—

While the Act of 1918 merely penalised the disclosure by a public servant of the particulars contained in any statement or return furnished under the Act section 54 further penalises the disclosure of any particulars contained in any accounts or documents produced under the Act or in any evidence given or deposition made in the course of proceedings under the Act or in any record of an assessment proceeding or proceedings for recovery of a demand, and debars the Courts from requiring public servants to produce income tax records or to give evidence respecting the same

The proviso to sub-section (2) contains provisions stating in what particular cases information may be disclosed. The effect of the provi

sions is that information obtained in connection with the assessment of incomes and recovery of the tax may be disclosed by public servants to such persons only as act in the execution of the Act and where it may be necessary to disclose the same to them for the purposes of the Act or in order to, or in the course of a prosecution for perjury committed in connection with proceedings under the Act Proviso (c) was inserted mainly for the purpose of extending the protection to every action of a public servant in pursuance of the provisions of the Act or the rules such as the service of a notice by affixture Apart from these particular cases it is essential that all records should be kept strictly confidential, and, in particular, the practice in certain provinces of furnishing information to local authorities, who impose a tax on "circumstances and property" or a local income tax of the details of assessment made by the income tax authorities must cease This prohibition applies equally to furnishing such information to other Government departments

For the meaning of the phrase 'public servant" *see* paragraph 9 (*Income tax Manual*, para 97)

United Kingdom Law—

There is no similar provision in the English Acts, but the Courts have almost invariably upheld the privilege of the Crown not to produce such evidence There are numerous cases on the subject of which a few may be cited *Christie* v *Craik*,[8] *Keir* v *Outram*,[9] In re *Joseph Hargreaves*[10] In the United Kingdom every officer charged with duties under the Income tax Act has to make a declaration as to secrecy

Returns—When admissible in evidence—

A certified copy of an Income tax Return obtained by a person other than the assessee is not admissible as evidence under the Indian Evidence Act, because the disclosure of the return is prohibited by section 54 of the Income tax Act[11]

Disclosure which is obligatory under law—

This section does not authorise persons who are bound to disclose information under other law to withhold such information For example, an Income tax Officer who comes across a document which, under the Stamp Act, has to be impounded, must inform the Collector about the matter It follows that an officer so disclosing information will not fall within the mischief of this section

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(8) 37 Sc. L R 503

(9) 51 Sc L R 8

(10) 4 Tax Cases 173

(11) *Anwar Ali* v *Tafazal Ahmad*, I I T C. 377

CHAPTER IX

SUPER-TAX

55 In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, unregistered firm or other association of individuals, not being a registered firm, an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by Act of the Indian Legislature

Charge of super tax

Provided that where the profits and gains of an unregistered firm have been assessed to super-tax, super-tax shall not be payable by an individual having a share in the firm in respect of the amount of such profits and gains which is proportionate to his share

Super-tax—

The provisions of the Act regarding income tax other than those specially excepted in section 58 apply also to super tax which is merely, as stated in section 55 "an additional duty of income-tax" Super tax is levied at the rates specified in the Finance Act

The super tax on companies is levied at a flat rate on the whole of the profits of a company This tax on companies, which takes the *place of the tax formerly* levied at a graded scale of rates on the "undistributed profits" of a company, is levied on the company as such on account of the special privileges which *companies enjoy by* statute in the shape of corporate finance and limited liability No refund on account of super tax on companies is, therefore, *allowed to shareholders*

Apart from the tax on companies which stands in a class by itself, super tax is levied on a scale of graduated rates While in the case of income tax the different rates are applied to the *whole* of an assessee's income, the different rates of super tax are levied on successive "slices" of, *i e*, on the portions of an assessee's income in excess of certain limits or the portions lying between certain limits

Hindu undivided families are *treated, for purposes* of super-tax, as for income tax purposes, as separate assessees

Unregistered firms are also treated as separate assessees Where, however, an unregistered firm itself is not assessed to super tax (*e g* if its assessable profits are less than Rs 50,000), in *that case only* is the income which any individual member of an unregistered firm receives from the firm included in his total income

Registered firms are not assessed to super tax, but the shares of partners in registered firms are included in the total income of the individual partners on which super tax is levied, and similarly, the dividends of shareholders received from companies are included in the individual income of those shareholders

The tax is levied on "total income", and "total income" in all cases means exactly the same thing as total income calculated for income tax purposes with the solitary exception that where an unregistered firm is itself assessed to super tax the share of the profits of a member of the unregistered firm is excluded from his total income for super tax purposes (*Income tax Manual*, para 98)

History—

Super tax was first imposed in India in 1917 The tax was then levied on much the same lines as now, except that companies were taxed on a graduated scale exactly like individuals, but only on the undistributed profits and gains (there was no distinction between registered and unregistered firms) or the profits not paid or allotted to partners This was objected to by the mercantile community as militating against conservative business management because it discouraged companies putting by reserves The law was accordingly altered in 1920, and companies were taxed on the whole of their profits but at a flat and comparatively low rate The rates are, since 1922, regulated by the Finance Act and not by the Income tax Act itself The reference to "other association of individuals" was inserted by Act XI of 1924

No separate assessment for super-tax—

An assessment made under section 23 or 34 includes both the assessment for super tax and for income tax It is not necessary for the Income tax Officer to pass two separate assessment orders English decisions as to the effect of an income tax assessment on the super tax assessment are not relevant, the machinery and procedure in England for the two taxes being different from each other

References—

See also notes under section 2 (6)—Company, 2 (9)—Hindu Undivided Family, 2 (14)—Registered firm, and 2 (16)—Unregistered firm Also, under section 16—Definition of 'total income' and 'previous year' section 2 (11)

Association of individuals—

See notes under section 3 The proviso to section 55 does not apply to a member of an "other association of individuals". Though section 14 was amended by Act XXII of 1930, so as to

relieve such a member from income tax on the profits alrea taxed on the association no amendment was made to section

Total income—

The 'total income' is the same as for income tax, b subject to the changes necessitated by section 58 (1) For detai *see* that section

Additional duty—

Super tax is of the same kind as income tax and m not therefore be deducted in arriving at the income taxable f income tax or *vice versa*

At the rate or rates etc —

The slight difference between the wording of this secti and that of section 3 is due to the fact that income tax is ca culated with reference to the total income at a flat rate where super tax is levied on a 'slab' basis

Proviso—

No super tax can be levied on the portion taxed in the han of the unregistered firm of which the individual is a partner view of the 'slab' system on which super tax is levied such incom can be neither taxed nor taken into account in fixing the rate o rates at which other 'slabs' of income are taxed, even though th word 'payable' may suggest at first sight that there is nothin to prevent the income being taken into account in fixing the *rat* of tax on the other income

Free of super tax—

As regards payments 'free of super tax' *see* notes unde section 3 Also the cases set out *infra*

United Kingdom Law—

In the United Kingdom no super tax is paid by companie or firms the tax is levied on individuals only A tax corre pond ing to the company super tax in British India called the Corpora tion Profits Tax was levied on companies between 1920 and 1924 but this was permitted to be deducted from the profits as a busi ness expense for the purpose of computing income tax It was treated for the purpose like the Excess Profits Duty

See notes under section 49 as to the replacement of super tax by a sur tax in the United Kingdom with effect from 1929 30

Super tax—Reimbursement of—Whether included in income—

Under the will of her late husband the assessee received a certain income, and in addition an annuity just enough to re imburse all super tax payable by her She was assessed to super tax for the year 1913 14 and the Trustees under the will paid

the tax charged under the assessment out of the Trust moneys held by them, from which income tax had been deducted at the source An additional assessment to super tax for the year 1914-15 in respect of the super tax thus paid by the Trustees on the assessee's behalf and of the income tax applicable thereto was made upon the assessee *Held,* that the additional assessment had been correctly made, and that the amount of the super tax paid for the assessee *plus* the income tax applicable to that amount formed part of her total income for the purpose of super tax [12]

Dividends—Free of income tax—Gross dividend chargeable to super-tax—

The assessee owned certain ordinary shares in a company, and, under the authority of a resolution of the Directors duly confirmed by the company at its annual general meeting, the dividends upon these shares had been paid 'free of income tax' In making the super tax assessments, the Special Commissioners computed the income derived from these dividends as follows —Assuming the amount of the "tax free" dividend to be £100 and income tax at a uniform rate of 1*s* 2*d* to apply the whole period in respect of which such dividend was paid

Actual amount of dividend received free of tax	£100 0 0
Add Income tax at 1*s* 2*d* *i e* 1*s* 2*d* for every 18*s* 10*d*	6 3 10
Gross amount of dividend receivable	£106 3 10

Held, that the amount to be included in the assessee's return of total income for purposes of super tax was not the amount of dividend actually received by him, but that amount, with the addition thereto of the amount of income tax in respect of it as above set out [13]

(Section 16 of the Indian Act directly provides for this, and under section 56 the total income for income tax is also the total income for super tax)

Total income for purposes of super tax

56 Subject to the provisions of this Chapter the total income of any individual, Hindu undivided family, company unregistered firm or other association of individuals,

(12) *Mrs M M A S Meeking* (In the names of J C M A Wilson and H Johnson) v *The Commissioners of Inland Revenue* 7 Tax Cases 603

(13) *Ashton Gas Company* v *Attorney General* 1906 A C 10 followed, *Sir Marcus Samuel, Bart* v *The Commissioners of Inland Revenue,* 7 Tax Cases 277

shall for the purposes of super-tax be the total income as assessed for the purposes of income-tax and where an assessment of total income has become final and conclusive for the purposes of income-tax for any year the assessment shall also be final and conclusive for the purposes of super-tax for the same year

History—

See section 2 of the Super tax Act of 1917 and section 3 of the Super tax Act of 1920

As regards the insertion of the words 'other association of individuals made by Act XI of 1924 *see* notes under section 3

As regards the proviso to this section, which was inserted by Act V of 1925 and removed by Act III of 1928, *see* notes under section 26 The proviso was as below —

Provided that in computing the total income of a member of a registered firm where any change occurs in the constitution of the firm, the profits or gains of the firm during the previous year shall be deemed to have been received in that year by the members of the firm as constituted at the time of the making of the assessment to super tax in proportion to their shares in the firm at that time

United Kingdom Law—

See section 5 of the Income tax Act of 1918 and *National Provident Institution* v *Brown*[14] and *Fitzgerald* v *Inland Revenue*[15] Super tax was levied on the income of the previous year while income tax was till recently levied on a three years' average or the current year s income as the case may be, according to the Schedule under which the tax is charged Also *see* notes under section 5 as to the different administrative agencies for assessing Super tax and Income tax and notes under section 49 as to the replacement of the super tax by a sur tax with effect from 1929 30

Non resident partners and shareholders

57 (1) In the case of any [16][person] residing out of British India who is a member of a registered firm and whose share of the profits from such firm is liable to super tax, the remaining members of such firm who are resident in British India

(14) 8 Tax Cases 57

(15) 7 Tax Cases 284

(16) This word was substituted for the word assessee by S 5 of Act XXIV of 1926

shall be jointly and severally liable to pay the super-tax due from the non-resident member in respect of such share

[17][(2) Where the Income-tax Officer has reason to believe that any person, who is a shareholder in a company, is resident out of British India and that the total income of such person will in any year exceed the maximum amount which is not chargeable to super-tax under the law for the time being in force, he may, by order in writing, require the principal officer of the company to deduct, at the time of payment of any dividend from the company to the shareholder in that year, super-tax at such rate as the Income-tax Officer may determine as being the rate applicable in respect of the income of the shareholder in that year

(3) If in any year the amount of any dividend or the aggregate amount of any dividends paid to any shareholder by a company (together with the amount of any income-tax payable by the company in respect thereof) exceeds the maximum amount of the total income of a person which is not chargeable to super-tax under the law for the time being in force, and the principal officer of the company has not reason to believe that the shareholder is resident in British India, and no order under sub-section (2) has been received in respect of such shareholder by the principal officer, from the Income-tax Officer, the principal officer shall at the time of payment deduct super-tax on the amount of such excess at the rate which would be applicable under the law for the time being in force if the amount of such dividend or dividends (together with the amount of such income tax as aforesaid) constituted the whole total income of the shareholder.]

(17) Sub-sections (2) and (3) were substituted for the original sub-section (2), by ibid

[18][(4)] Where any person pays any tax under the provisions of this section on account of [18](another person) who is residing out of British India, credit shall be given therefor in determining the amount of the tax to be payable by any agent of such non-resident (person) under the provisions of sections 42 and 43

Rule 44—

All sums deducted in accordance with sub sections (2) and (3) of section 57 shall be paid by the person making the deduction to the credit of the Government of India within one week from the date of such deduction into the nearest Treasury or to the nearest branch of the Imperial Bank of India which receives payments on behalf of Government

History—

There was no corresponding section in the previous Acts The section was recast in 1926 by Act XXIV of 1926

Deduction of super tax at the source—

Provision is rendered necessary owing to the difficulty of obtaining super tax from non residents Section 57 (1) provides that in order to recover super tax from the share of the profits of a partner in a registered firm who is not resident in British India the resident partners are themselves jointly and severally liable to pay the super tax due from the non resident in respect of his share Sub section (2) authorises an Income tax Officer to require the principal officer of a company to deduct super tax at the rate determined by him from the dividends payable to a non resident shareholder whose total income is expected to exceed the minimum amount liable to super tax even if the amount of the dividend or dividends payable with the income tax thereon does not by itself exceed the minimum liable to super tax This rate must be the effective or average rate of super tax that is to say first the total amount of super tax due on the total income must be calculated Then the rate is to be arrived at by dividing this total super tax by the total income That rate is to be notified to all persons paying dividends and they should be required to deduct super tax at that rate from whatever dividends they pay Sub section (2) should not ordinarily be resorted to where the non resident shareholder has a duly authorised agent in India *to whom his dividends are paid* and through whom he can be assessed to super tax in the ordinary way under section 43 of the Act But sub section (2) should be employed where special circumstances render it necessary—for example where a non resident has resorted to some device by which proceedings under section 43 have been rendered infructuous Any such case should be reported by the Income tax Officer concerned through the Assistant Commissioner of Income tax whose orders should be taken before

(18) Original sub section (3) was re numbered (4) and the words "another person" and "person" were substituted for the words "an assessee" and "assessee" respectively by S 5 of Act XXIV of 1926

proceeding under the new section 57 (2) Sub section (3) makes the principal officer of a company liable to deduct any super tax due on dividends payable to a shareholder whom he has no reason to believe to be resident in British India The liability merely attaches where the amount of the profits or dividends payable to the non resident partner or shareholder, together with the amount of any income tax payable by the company in respect thereof is taken by itself liable to super tax on the assumption that it represents the whole income of the non resident partner or share holder It should be observed that if for example dividends are paid half yearly, and the combined amount of the two payments in any year and the income tax thereon exceeds the minimum liable to super tax though the first payment including the income tax on it taken by itself, does not exceed it the principal officer is bound to deduct the super tax on such excess from the second payment The Act does not require the resident partner or the principal officer to obtain from the non resident partner or shareholder a statement of any other income that may accrue to him in British India Where there is reason to believe that there is such other income it will be necessary to rely on the provisions of sections 42 and 43 of the Act or sub section (2) of section 57 In the case of companies the obligation to deduct applies only to dividends, and does not apply to other sums which a non resident may receive from the company by way of interest on debentures or remuneration such as director s fees If the non resident is himself assessed through an agent sub section (4) provides that the amount deducted at the source in this manner shall be taken into account in determining the amount payable by him in respect of any other income

In the case of registered firms it should in most cases be possible to treat the person who registered the firm as the agent of the non resident partner and to require him to disclose the whole income accruing in India to such non resident (*Income tax Manual* para 99)

Super tax—Deduction at source from dividends of non resident shareholders—

Sometimes large blocks of shares are registered in the names of Banks and held by them on behalf of the real owners for various reasons though the Banks have no proprietary or beneficial interest therein The aggregate dividends on a block of shares in a single company thus held by a Bank may exceed the maximum amount exempt from super tax though the dividends payable to some or all of the real owners individually may not exceed that amount In such circumstances super tax should not be deducted at source from the dividends payable to the Bank irrespective of the liability of the several real owners of the shares If therefore a Bank in such circumstances furnishes the Income tax Officer assessing the company from time to time with a list giving the names and addresses of the real owners of the shares and the number of shares held by each the Income tax Officer will inform the principal officer of the company under sub section (2) of section 57 of the correct amount of super tax to be deducted in respect of the dividends payable to the Bank or that no super tax is to be deducted therefrom as the case may be,

having regard to the liability of the individual shareholders (*Income-tax Manual*, para 100)

Resident—Resides—

See notes under section 4 (2)

"Has not reason to believe that the shareholder is resident in British India"—

In the absence of information to the contrary, the principal officer of the company should act on the assumption that the shareholder is non resident

Sub sections (2) and (3) can obviously come into operation only when dividends are paid in British India. Under neither sub section can the principal officer deduct tax from other payments than dividends

Interest on securities—

The section applies only to dividends of companies and profits of partners in registered firms. It does not apply to other kinds of income, *e g* interest on securities or from 'other sources'.

Person—

The liability to super tax arises only in the *next* year, and no one can be an 'assessee' until he has been assessed, *i e*, a specific amount has been determined as payable by him [section 2 (2)] At the time of payment of dividend, the non-resident is therefore *not* an assessee The section therefore was inoperative, and by the amendment in 1926 this defect in the wording has been removed, the word 'person' having been substituted for 'assessee'

United Kingdom Law—

There are no similar provisions under the United Kingdom law

Application of Act to super tax.

58. (1) All the provisions of this Act, except section 3, the proviso to sub-section (1) of section 7, the provisos to section 8, sub-section (2) of section 14, and sections 15, 17, 18, 19, 20, 21 and 48 shall apply, so far as may be, to the charge, assessment, collection and recovery of super-tax.

Provided that sub-sections (4) to (9) of section 18 shall apply, so far as may be, to the assessment, collection and recovery of super-tax under sub-section (2) or sub-section (3) of section 57 and under section 58-H (2)

(2) Save as provided in section 57 and section 58-H super-tax shall be payable by the assessee direct

History—

See sections 3 and 6 of the 1920 Act and section 8 of the 1917 Act The proviso to sub section (1) was added by Act XXIV of 1926 The addition of the proviso covers up a lacuna which formerly existed in the Act The references to section 58-H were made by Act XII of 1929

Sub section (1)—

Section 3 is the charging section for Income tax The proviso to sub section (1) of section 7 relates to the exemption of deductions, under the authority of Government, from the salary of a person for the purpose of securing to him a deferred annuity or of making provision for his wife or children

The provisos to section 8 relate to tax free securities

Sub section (2) of section 14 relates to the exemption from tax of the share of a person's income from a firm which is taxed and of dividends from a company that is assessed to tax As regards a shareholder in a company the fact that the company has paid super tax (at a flat rate) does not absolve the liability of the shareholder to pay super tax in respect of the dividends received by him Similarly, the share of profits in an unregistered firm assessed to super tax would be again taxable in the hands of the partner but for the express exemption of such profits under the proviso to section 55 Registered firms are *not* liable to super tax at all,—*see* section 55 Section 15 relates to the exemption of provision for life insurance Section 17 relates to marginal relief on account of Income tax The problem does not arise in respect of Super tax which is levied on the 'slab plan

Section 18 relates to the collection of Income tax at source, section 19 to the payment direct of Income tax in other cases, section 20 to the issue of certificates on account of Income tax to shareholders by companies, section 21 to the annual return of salaries, etc, to be provided for employees, and section 48 to refund of tax collected at source

All the other provisions of the Act apply in respect of Super tax

Sub section (2)—

With the solitary exceptions in section 57 and section 58-H, super tax cannot be deducted at source but only from the assessee, including an agent who is assessed, after an assessment under section 23 and the issue of a notice of demand under section 29

United Kingdom Law—

In England also, the law is much the same, and no abatement is made for Super tax on account of premia paid for Life Insurance or subscriptions to Provident Funds or interest from Tax free Securities But the administrative machinery for assessing Super tax is quite different from that for assessing Income tax, see notes under section 5

CHAPTER IX A

Special Provisions relating to certain classes of Provident Funds

General—

This Chapter, along with consequential amendments in sections 4 (3), 15 and 58, was introduced by Act XII of 1929 As observed by the Honourable Finance Member in the Legislative Assembly and by the Financial Secretary in the Council of State, the concessions constitute a far reaching experiment without a direct precedent The provisions, it was stated, are therefore tentative and liable to alteration in the light of experience

The main features of the concessions are (*a*) The contributions of the employer and the employee together will be exempt up to a limit of one sixth of the employee's salary (*b*) In addition to the above, the employee can get abatement of tax on account of insurance premia on the difference between one sixth of his total income and one sixth of salary or such lower amount on which he may receive exemption under section 58-F (*c*) Interest on contributions including accumulations is exempt up to a rate laid down by the Governor General in Council, now 6 per cent per annum (*d*) The interest on the investments of the funds is exempt from tax (*e*) The annual accretion to an account, that is, the increase in the balance both on account of contributions and on account of interest is deemed to be received by the employee every year and taxed accordingly subject to the above exemptions (*f*) The accumulated contributions are exempt from tax, when paid, except in the case of employees with less service than five years who however can be exempted in certain circumstances by the Commissioner

The conditions of recognition of funds are set out in sections 58 C and D The most important conditions are the vesting of the fund in trustees under irrevocable trusts, the regularity of saving, *i e*, of contributions and the non recoverability by the employer, except in specified circumstances and within strict limits, of sums from the fund

58-A In this Chapter, unless there is anything repugnant in the subject or context,—

Definitions

(*a*) a "recognised provident fund" means a provident fund which has been and continues to be recognised by the Commissioner, in accordance with the provisions of this Chapter,

(*b*) an "employer" means—

(i) a Hindu undivided family, company, firm or other association of individuals or persons, or

(ii) an individual engaged in a business, profession or vocation whereof the profits and gains are assessable to income-tax under section 10 or section 11, maintaining a provident fund for the benefit of his or its employees,

(c) an "employee" means an employee participating in a provident fund, but does not include a personal or domestic servant,

(*d*) a "contribution" means any sum credited by or on behalf of any employee out of his salary, or by an employer out of his own monies, to the individual account of an employee, but does not include any sum credited as interest,

(*e*) the "balance to the credit" of an employee means the total amount to the credit of his individual account in a provident fund at any time,

(*f*) the "annual accretion" to the balance to the credit of an employee means the increase to such balance in any year, arising from contributions and interest,

(*g*) the "accumulated balance due" to an employee means the balance to his credit, or such portion thereof as may be claimable by him under the regulations of the fund, on the day he ceases to be an employee of the employer maintaining the fund, and

(h) the "regulations of a fund" means the special body of regulations governing the constitution and administration of a particular provident fund

These definitions are special ones intended for this Chapter only.

(a) "Has been and continues to be recognised"

As regards the according and withdrawal of recognition—*see section 58 B*

(b) "Association of persons"—this is intended to cover cases like Chambers of Commerce which are associations of associations

In (i) it is not necessary that the employer should engage *in a* business or a profession For example a University, School, Hospital or Public Library can obtain the benefits of this Chapter It is only *in* (ii), *i e*, when the employer is an individual that he should be engaged in business or in a profession

(c) All employees whether paid salaries or wages are eligible excepting domestic and personal servants, *see* notes under *section* 58 C (b)

(d) Popularly and also in the Provident Funds Act, 1925, the employee's contributions are usually called '*Subscriptions*', and the *employers*' '*Contributions*' The Act uses '*Contributions*' to cover both

(e) The balance obviously includes interest

(f) The need for and the importance of this definition will be seen from section 58 E

(g) This definition has been framed so as to be applicable to all funds, and has no reference to the regulations embodied in this Act and the rules thereunder

58-B (1) The Commissioner of Income-tax may accord recognition to any provident fund which, in his opinion, satisfies the conditions prescribed in section 58-C and the rules made thereunder, and may, at any time, withdraw such recognition if, in his opinion, the provident fund contravenes any of those conditions.

The according and withdrawal of recognition

(2) The Governor-General in Council may, at his discretion, direct the Commissioner of Income-tax to refuse

to accord recognition to any provident fund, or may, at any time, withdraw recognition from any recognised provident fund.

(3) An order according recognition shall take effect on such date as the Commissioner may fix in accordance with any rules the Central Board of Revenue may make in this behalf, such date not being later than the last day of the financial year in which the order is made

(4) An order withdrawing recognition shall take effect from the day on which it is made

(5) An employer objecting to an order of the Commissioner refusing to recognise a provident fund may appeal, within sixty days of such order, to the Central Board of Revenue

The appeal shall be in the form and shall be verified in the manner prescribed by the Central Board of Revenue

Government of India Rules—

10 (1) An application for recognition shall be made by the employer maintaining the fund for which recognition is sought and shall be accompanied by the following documents —

(*a*) The trust deed if any in original with one copy thereof, the latter to be retained by the Commissioner, and

(*b*) the rules of the fund

Provided that if the original of the trust deed cannot conveniently be produced, it shall be open to the Commissioner of Income tax to accept in lieu of the original a copy certified either by a Magistrate or in any manner specified in rule 7 of the Indian Companies Rules, 1914, in which case an additional copy shall be furnished for retention by the Commissioner

(2) The application shall be submitted through the Income tax Officer of the area in which the accounts of the funds are kept or if the accounts are kept outside India, through the Income tax Officer of the area in which the local headquarters of the employer are situate

(3) The application shall contain the following information —

(a) Name of employer and address, his business, profession, etc, also his principal place of business

(b) Number of employees subscribing to the fund—

(i) in British India,

(ii) in Indian States,

(iii) outside India

(c) Place where the accounts of the fund are or will be maintained

(d) If the fund is already in existence—

(i) a copy of the last balance sheet of the fund where such is maintained,

(ii) details of investments of the fund

(4) A verification in the following form shall be annexed to the application —

Form of Verification

We/I the trustee(s) of the abovenamed fund do declare that what is stated in the above application is true to the best of our information and belief, and that the documents sent herewith are the originals or true copies thereof

14 Before withdrawing recognition, the Commissioner of Income tax shall give an opportunity to the employer and the trustees of the fund to show cause why recognition should not be withdrawn

Central Board of Revenue's Rules—

3 An order according recognition to a provident fund shall take effect—

(a) in cases where the application for recognition is received by the Commissioner of Income tax before the 31st May 1930,—on the 31st March 1930

(b) in other cases on the last day of the month in which the order is made, or, at the request of the employer, on the last day of any later month in the same financial year

4 An appeal under sub section (5), of section 58 B shall be in the following form and shall be verified in the manner indicated therein —

Form of appeal against non recognition of a Provident Fund by a Commissioner of Income tax

To

The Central Board of Revenue

The petition of employer(s) carrying on business, profession or at .

Your petitioner(s) applied to the Commissioner of Income tax under section 58 B of the Indian Income tax Act, 1922, for the recognition of the provident fund maintained by them (him) for the benefit of their (his) employees The Commissioner of Income tax has refused recognition for the reasons stated in his order, dated of which a copy is attached

For the reasons set out below your petitioner(s) submit(s) that the fund should be recognised, and pray(s) that the Central Board of Revenue may be pleased to accord recognition

Grounds of Appeal

We/I the petitioner(s) named in the above petition do declare that what is stated therein is true to the best of our/my information and belief

Signature

Date *Address of Appellant*

Limitation—

See section 67 A as regards the computation of limitation for the purposes of appeal

Appeal against withdrawal of recognition—

The section does not provide for such appeal Government, however, will presumably allow as an extra statutory concession such appeals to be made on the same conditions as an appeal against an order refusing recognition

Withdrawal of recognition by the Governor General in Council—

This is an emergency power kept in reserve against possible abuse of the spirit of the concessions while satisfying the letter of the various conditions laid down

Conditions to be satisfied by a recognised provident fund.

58-C (1) In order that a provident fund may receive and retain recognition it shall satisfy the conditions set out below and any other conditions which the Governor-General in Council may, by rule, prescribe—

(*a*) All employees shall be employed in India, or shall be employed by an employer whose principal place of business is in British India

(*b*) The contributions of an employee in any year shall be a definite proportion of his salary for that year, and shall be deducted by the employer from the employee's salary in that proportion, at each periodical payment of such salary in that year, and credited to the employee's individual account in the fund.

(*c*) Subject to the provisions of S. 58-D, the contributions of an employer to the individual account of an employee in any year shall not exceed the amount of the contributions of the employee in that year, and shall be credited to the employee's individual account at intervals not exceeding one year.

(*d*) The fund shall consist of contributions as above specified, of accumulations thereof, and of interest (simple and compound), credited in respect of such contributions and accumulations, and of securities purchased therewith, and of no other sums.

(*e*) The fund shall be vested in two or more trustees, under a trust which shall not be revocable save with the consent of all the beneficiaries.

(*f*) The employer shall not be entitled to recover any sum whatsoever from the fund, save in cases where the employee is dismissed for misconduct or voluntarily leaves his employment otherwise than on account of ill-health or other unavoidable cause before the expiration of the term of service specified in this behalf in the regulations of the fund.

In such cases the recoveries made by the employer shall be limited to the contributions made by him to the individual account of the employee, and to interest (simple and compound) credited in respect of such contributions and accumulations thereof, in accordance with the regulations of the fund.

(g) The accumulated balance due to an employee shall be payable on the day he ceases to be an employee of the employer maintaining the fund

(h) Save as provided in clause (g), or in accordance with such conditions and restrictions as the Governor-General in Council may, by rules, prescribe, no portion of the balance to the credit of an employee shall be payable to him.

(2) Where there is a repugnance between any regulation of a recognised provident fund and any provision of this Chapter or of the rules made thereunder, the regulation shall, to the extent of the repugnance, be of no effect

The Commissioner may, at any time, require that such repugnance shall be removed from the regulations of the fund

"Any other conditions"—The following rule has been made by the Governor General in Council —

Rule 3—The contributions made by employees after the date of recognition of a provident fund and the interest on the accumulated balances of such contributions shall be wholly invested in securities of the nature specified in clause (*a*), (*b*), (*c*), (*d*) or (*e*) of section 20 of the Indian Trusts Act, 1882, and payable both in respect of capital and of interest in British India

S 20 of the Indian Trusts Act, 1882—

"Where the trust property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others —

(*a*) in promissory notes, debentures, stock or other securities of the Government of India, or of the United Kingdom of Great Britain and Ireland,

(*b*) *in bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India,*

(*c*) in stock or debentures of, or shares in, Railway or other Companies the interest whereon shall have been guaranteed by the Secretary of State for India in Council;

(*d*) in debentures or other securities for money issued by, or on behalf of, any municipal body under the authority of any Act of a legislature established in British India,

(*e*) on a first mortgage of immovable property situate in British India Provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-third, or, if consisting of buildings, exceeds by one half, the mortgage money or

(*f*) on any other security expressly authorised by the instrument of trust, or by any rule which the High Court may from time to time prescribe in this behalf

Provided that, where there is a person competent to contract and entitled in possession to receive the income of the trust property for his life, or for any greater estate, no investment on any security mentioned or referred to in clauses (*d*), (*e*) and (*f*) shall be made without his consent in writing"

Notes—The securities referred to above exhaust the investments that can be made Other securities, however sound, *e g* securities on which the Imperial Bank of India is authorised to lend are excluded It should be particularly noted that the restriction applies only to employee s contributions and interest thereon after the date of recognition

The condition that the securities should be payable in British India both in respect of capital and of interest is also important

Sub section (*a*)—"All employees" evidently refers to all employees subscribing to the fund and not all employees of the particular employer Otherwise no employee of an employer whose principal place of business was outside British India could get the concessions under this Chapter

Sub section (*b*)—*Definite proportion* should not fluctuate at anybody's discretion but be laid down—even though within varying limits—by the regulations of the fund *See* section 58 D as regards contributions of a contingent nature

Deducted at each periodical payment, etc—The employee s contributions must be deducted when salary is paid and at once credited to his account in the fund It cannot be collected at longer intervals

"Salary' as used in this Chapter is not used in the same sense as in section 7, but is confined to regular, periodical payments of salary, wages, etc The definition of "employee" in sub section (*c*) of section 58 A which excludes only one class of wage-earners, *viz*, personal and domestic servants, makes it clear

that "salary" as used in this Chapter includes "wages" also As regards the distinction between "salary" and "wages," *see* notes under section 7

Sub section (*c*) —The object of this sub section is to prevent abuse which is otherwise possible by private companies and firms who might give nominal salaries and disproportion ately high contributions to their employees The scope of the abuse is, however, limited by section 58 F which restricts the exemption to one sixth of salary

The employer should part with his money every year and make it over to the trustees

Sub section (*e*) —This is the most important condition

Sub section (*f*) —Compare section 6 of the Provident Funds Act (XIX of 1925) on which it is modelled

Sub section (*g*) —No exemption from tax is admissible after the date on which the accumulated balance is due to be paid

Sub section (*h*) —The rules made by the Governor General in Council under this sub section restrict withdrawals by employees while still in service

The rules are set out below

4 (1) Withdrawals by employees shall not be allowed by the trustees except on special grounds in the following circum stances or circumstances of a similar nature—

(*a*) to pay expenses incurred in connection with the ill ness of a subscriber or a member of his family,

(*b*) to pay for the passage over the sea of a subscriber or any member of his family,

(*c*) to pay expenses in connection with marriages, funerals or ceremonies which by the religion of the subscriber it is incumbent upon him to perform and in connection with which it is obligatory that expenditure should be incurred,

(*d*) to meet the expenditure on building or purchasing a house or a site for a house provided that such house or site is assigned to the trustees of the fund,

(*e*) to pay premia on policies of insurance on the life of the subscriber or of his wife provided that the policy is assigned to the trustees of the fund and that the receipts granted by the insurance company for the premia are from time to time handed over to the trustees for inspection by the Income tax Officer

(2) For the purposes of sub rule (1) "Family" means any of the following persons who reside with and are wholly depend

ent on the employee, namely, the employee's wife, legitimate children, step children, parents, sisters and minor brothers

(3) No such withdrawal shall exceed (1) the pay of the employee *for three months, or, in the case of a withdrawal for* the purpose specified in clause (*d*) of sub rule (1), six months at the time when the advance is granted or (2) the total of the accumulation of exempted contributions and exempted interest contained in the balance to the credit of the employee whichever is less

(4) A second withdrawal shall not be permitted until the sum first withdrawn has been fully repaid

5 (1) Where a withdrawal is allowed for a purpose specified in clause (*d*) or clause (*e*) of sub rule (1) of rule 4 the amount withdrawn need not be repaid

(2) Where a withdrawal is allowed for any other purpose the amount withdrawn shall be repaid in not more than twenty four equal monthly instalments and shall bear interest in accordance with rule 6 and no further withdrawal shall be permitted until repayment has been effected in full

6 In respect of withdrawals which are repaid in not more than 12 monthly instalments, an additional instalment of 4 per cent of the amount withdrawn shall be paid on account of interest, and in respect of withdrawals which are repaid in more than 12 monthly instalments two such instalments of 4 per cent of the amount withdrawn shall be paid on account of interest

Provided, however, that at the discretion of the Trustees of the Fund, interest may be recovered on the amount withdrawn or the balance thereof outstanding from time to time at 1 per cent above the rate which is payable for the time being on the balance in the fund at the credit of the member

7 The employer shall deduct such instalments from the employee's salary, and pay them to the Trustees The deductions shall commence from the second monthly payment made after the withdrawal or in the case of an employee on leave without pay from the second monthly payment made after his return to duty

8 In case of default of repayment of instalments under rules 6 and 7, the Commissioner of Income tax may at his discretion order that the amount of the withdrawal or the amount outstanding shall be added to the total income of the employee for the year in which the default occurs and the Income tax Officer hall assess the employee accordingly.

9 Notwithstanding anything contained in rules 4 to 8, it shall be open to the trustees of a recognised provident fund to permit the withdrawal of ninety per cent of the amount standing at the credit of an employee if the employee takes leave preparatory to retirement, provided that if he rejoins duty on the expiry of his leave he shall refund the amount drawn together with interest at the rate allowed by the fund

Notes —The above rules are modelled to some extent on the rules of the Government General Provident Fund regulating temporary withdrawals therefrom But they differ in some details, *e g* in allowing permanent withdrawals for house building

Repayments of advances are not income and cannot therefore be taxed as addition to income or exempted from tax

Sub section (2) —If the repugnance were not removed, it would be open to and be the duty of the Commissioner to withdraw recognition—*see* section 58 B (1)

58-D Subject to any rules which the Governor-General in Council may make in this behalf the Commissioner may in respect of any particular fund relax the provisions of condition (*c*) of sub section (1) of section 58-C—

Power to relax restrictions of employer s contributions in certain cases

(*a*) so as to permit the payment of larger contributions by an employer to the individual accounts of employees whose salary does not exceed five hundred rupees per mensem and

(*b*) so as to permit the crediting by employers to the individual accounts of employees of periodical bonuses or other contributions of a contingent nature where the calculation and payment of such bonuses or other contributions is provided for on definite principles by the regulations of the fund

No rules have been framed under this section

Sub section (*b*) —The bonuses and contributions referred to are those granted yearly or half yearly by the employer at the time of closing accounts and ascertaining his profits but unless these are provided for in the regulations of the fund and given to the employees irrespective of the employer s volition the contributions will not be eligible for the concession A contribu

tion, say, at the same percentage of salary as the dividend of the employer Company on its capital would be eligible for the concession if provided for by the regulations but a contribution which the employer can withhold at his option will not be eligible The law has not expressly provided for contributions of the following nature, e g, lapsing of forfeitures of contributions to dismissed employees in favour of other employees, and increases due to appreciation of the fund's securities The former is really an employer's contribution of a contingent nature while the latter is a mere accretion to capital (often compensated automatically by shrinkage in other years)

Annual accretion deemed to be income received

58 E The annual accretion in any year to the balance at the credit of an employee participating in a recognised provident fund shall be deemed to have been received by him in that year and shall be included in his total income *for* that year, and, subject to the exemptions specified in section 58-F, shall be liable to income-tax and super tax

Provided that for the purpose of sub-section (3) of section 15, out of such annual accretion only the employee's own contributions shall be included in his total income

It will be seen that the total income is deemed to include certain items—employer's contribution and interest—which might never be received by the employee at all This plan was deliberately adopted by the Select Committee in order to allow the whole of the employee's accumulation to be paid to him intact at the end of his service without any delay

As a consequence of this provision, employees whose salaries are just below the taxable minimum might become liable to tax, and similarly persons just below the lines at which rates of tax change might be liable to pay higher rates

The Bill as originally introduced by Government was drafted on the principle that all excess contributions and interest above the limit which is to be exempt from the payment of tax should be accumulated year by year and taxed as a lump sum at the end of the employee's service The Select Committee considered that, even to the limited extent of the excess contributions, this principle would be inconvenient in practice and

would be inequitable in those cases where the receipt of large lump sums might render an employee, otherwise exempt, liable to pay income tax, or raise his rate of income tax, or even render him liable to super tax

They therefore preferred the plan provided by this section

Proviso—

While for all other purposes, the total income of the employee will include the whole of the annual accretion, only his own contributions will be included for ascertaining his total income for the purpose of section 15 (3) If this were not done a subscriber to a recognised provident fund would be in a more favourable position than other persons

58-F (1) An employee shall not be liable to pay income-tax on contributions to his individual account in a recognised provident fund, in so far as the aggregate of such contributions in any year does not exceed one-sixth of his salary in that year.

Exemption of annual accretion from income tax

(2) In the accounts of a recognised provident fund, the contributions exempted from income-tax under sub-section (1) and accumulations thereof shall be shown separately, and interest thereon shall be calculated and shown separately Such interest shall be exempt from payment of income-tax, in so far as it is allowed at a rate not exceeding such rate as the Governor-General in Council may, by notification in the Gazette of India, fix in this behalf

Sub section (1) — The employee can obtain further abatement of tax on account of insurance premia *See* sections 15 (3) and 58 E (proviso)

Sub section (2) —Under Notification No 10 dated 15th March, 1930, the maximum rate of interest now in force is 6 per per cent per annum It is of course open to an employer to allow a higher rate of interest but the concessions of this Chapter will be allowed only in respect of the first 6 per cent of the interest so allowed

As regards the form of accounts, *see* section 58 I and rules made thereunder

58-G Where an employee participating in a recognised provident fund has rendered continuous service with his employer for a period of not less than five years, and the accumulated balance due to him becomes payable, such accumulated balance shall be exempt from payment of income-tax and super-tax, and shall be excluded from the computation of his total income

Exemption of accumulated balance from income tax and super tax

Provided that the Commissioner of Income-tax may allow such exemption and exclusion where the employee has rendered continuous service with the employer for a period of less than five years, if, in his opinion, the service has been terminated by reason of the employee's ill-health, or by the contraction or discontinuance of the employer's business, or other cause beyond the control of the employee

(2) Where exemption from payment of income-tax is not allowed under the provisions of sub-section (1), the Income-tax Officer shall calculate the total of the various sums of income-tax from the payment of which the contributions and interest credited to the employee's individual account have been exempted under the provisions of sub-sections (1) and (2) of section 58-F, and such total shall be payable by the employee, in addition to any other income-tax for which he may be liable for the year in which the accumulated balance due to him becomes payable

Sub section (1)—There is no definition of "continuous service" Authorised leave of absence will evidently not be an interruption of continuous service

The accumulated balance when paid will both be exempt from tax and also be excluded from total income, *i e*, not affect the rate of tax on the employee's other income for the year The Commissioner can use his discretion under the proviso and allow exemption only if the cause of termination of service was beyond the employee's control

Under sub section (2), only the tax exempted in the past can be recovered in addition to the tax leviable on the employee's other income in the year of past

The non exempt part of the accumulated balance cannot be added on to the income of the employee for that year and tax collected at the rate appropriate to such total income

58 H The trustees of a recognised provident fund, or other person authorised by the regulations of the fund to make payment of accumulated balances due to employees shall at the time an accumulated balance due to an employee is paid deduct there from any income-tax payable under sub section (2) of section 58-G and any income tax and super-tax payable on an employee s total income as determined under sub-section (3) of section 58 J and sub sections (4) to (9) of section 18 shall apply as if the sum to be deducted were income-tax payable under the head Salaries

Deduction at source of income tax payable on accumulated balances due

This section enjoins on the persons making payment of accumulated balances the duty of collecting tax due, if any, at source and making it over to the Government As regards the powers and liabilities of the trustees *see* sub sections (4) to (9) of section 18 and section 51 (*a*)

The tax to be recovered should be computed under section 58 G (2) and under section 58 J (3)

58 I (1) The accounts of a recognised provident fund shall be maintained by the trustees of the fund and shall be in such form and for such periods and shall contain such particulars as the Central Board of Revenue may prescribe

Accounts of recognised provident funds

(2) The accounts shall be open to inspection at all reasonable times by Income tax authorities and the trustees shall furnish to the Income-tax Officer such abstracts thereof as the Central Board of Revenue may prescribe

Central Board of Revenue Rules—

5 The accounts of a recognised provident fund shall be prepared at intervals of not more than twelve months

6 An account shall be maintained for each subscriber to the fund in the following form —

Date

Paid to employee

Lapsed to employer or to fund

Recovery by employer.

Year and Month	Salary	Contributions and Interest						Total contributions Columns 3, 5 and 7	Total interest Columns 4, 6 and 8	Exempt.		Not exempt		Additions to total income (5, 7 & 10)	Remarks
		Contributions by employee	Interest on sums in column 3	Regular contributions by employer	Interest on sums in column 5	Employer's contributions of a contingent nature (including forfeitures of ex-employee's contributions lapsing to the benefit of other employees)	Interest on sums in column 7			contributions not exceeding 1/6th of salary for the year	Interest on sums in column 11 at . . p c p a	Contributions Col 9 *minus* Column 11	Interest Column 10 *minus* Column 12		
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
BALANCE B F															
April															
May															
....															
....															
March															
Adjustment on account of temporary withdrawals account (Columns 11 and 12 only)	Total ..														
Adjustment on account of non re payable withdrawals account (Columns 11, 12, 13 and 14)	Total carried over	3 and 4		5 and 6		7 and 8				11 and 12					

N B —The totals of Columns 3 & 4, 5 & 6, 7 & 8 and 11 & 12 will be carried into the next year as the opening balance of Columns 3, 5, 7 & 11 respectively

NON REPAYABLE WITHDRAWALS ACCOUNT

	Amount	
Apr 1		
May		
June		
July		
March		
Total		

TEMPORARY WITHDRAWALS ACCOUNT

	Advance	Repayment	Interest
Balance brought forward—			
Apr 1			
May			
June			
July			
March			
		Balance carried over	

7 An abstract for the financial year or other applicable accounting period of the individual account of each employee participating in a recognised provident fund shall be furnished by the trustees to the Income tax Officer of the area in which the employer conducts his business, profession or vocation, or to such other Income-tax Officer as the Commissioner may, in each case, direct, not later than the fifteenth day of June in each year It shall be in the form prescribed in rule 6, but shall show only the totals of the various columns thereof for the financial year or other accounting period It shall also give an account of any temporary withdrawals by the employee during the year and of the repayment thereof

Notes—Income tax authorities, *i e*, the authorities referred to in section 5

As regards power to extend the date beyond the 15th June in the case of funds the accounts of which are kept outside British India, *see* rule 9 A of the rules made by the Governor General in Council, set out below

"9 A Where the accounts of a recognised provident fund are kept outside British India certified copies of the account shall be supplied not later than the 15th of June in each year to a local representative of the employer in British India

Provided that the Income tax Officer may in a year appoint a date later than the 15th of June as the date by which the certified copies shall be supplied "

Treatment of balances in newly recognised provident funds.

58-J (1) Where recognition is accorded to a provident fund with existing balances, an account shall be made of the fund up to the day before the day on which the recognition takes effect, showing the balance to the credit of each employee on such day, and containing such further particulars as the Central Board of Revenue may prescribe

(2) The account shall also show in respect of the balance to the credit of each employee the amount thereof which is to be transferred to that employee's account in the recognised provident fund, and such amount (hereinafter called his transferred balance) shall be shown as the balance to his credit in the recognised provident fund on

the date on which the recognition of the fund takes effect, and sub-sections (3) and (4) shall apply thereto

Any portion of the balance to the credit of an employee in the existing fund which is not transferred to the recognised fund shall be excluded from the accounts of the recognised fund and shall be liable to income-tax and super-tax in accordance with the provisions of this Act other than this Chapter.

(3) Subject to such rules as the Central Board of Revenue may make in this behalf, the Income-tax Officer shall make a calculation of the aggregate of all sums comprised in a transferred balance which would have been liable to income-tax if this Chapter had been in force from the date of the institution of the fund, without regard to any tax which may have been paid on any such sum, and such aggregate (if any) shall be deemed to be income received by the employee in the year in which the recognition of the fund takes effect, and shall be included in the employee's total income for that year, and, for the purposes of assessment, the remainder of the transferred balance shall be disregarded, but no other exemption or relief, by way of refund or otherwise, shall be granted in respect of any sum comprised in such transferred balance

Provided that, in cases of serious accounting difficulty, the Commissioner shall have power subject to the said rules, to make a summary calculation of such aggregate.

(4) Notwithstanding anything contained in condition (*h*) of sub-section (1) of section 58-C, an employee, in order to enable him to pay the amount of tax assessed on his total income as determined under sub-section (3), shall be entitled to withdraw from the balance to his credit in the recognised provident fund a sum not excee-

ding the difference between such amount and the amount to which he would have been assessed if the transferred balance had not been included in his total income

(5) Nothing in this section shall affect the rights of the persons administering an unrecognised provident fund or dealing with it, or with the balance to the credit of any individual employee, before recognition is accorded in any manner which may be lawful

Central Board of Revenue Rules—

8 The account to be made under the provisions of sub section (1) of section 58 J shall show in respect of each employee (i) the total salary paid to the employee during the period of his participation in the provident fund, (ii) the total contributions, (iii) the total interest which has accrued thereon, and (iv) so far as may be, the percentage of the employee's salary in accordance with which contributions have been made by the employer and employee

Extract from Select Committee's Report

We have cast the duty on employers of making up final accounts of existing funds and of showing in them the portion of each employee's balance *which is to be transferred to the recognised fund* Subject to the reservation that no tax already paid on an employee's own contribution will be refunded the portion so transferred will receive retrospectively exemption from tax up to the same limit as will be given to the employee's future account As regards any excess over and above the exempted portion which may be transferred in order to avoid inconvenience in individual cases arising from the payment of a large amount of income-tax on such a lump sum we have provided that an employee may withdraw the amount of the excess tax payable by him for that year from his balance in the recognised provident fund

Treatment of fund transferred by employer to trustee

58-K (1) Where an employer who maintains a provident fund (whether recognised or not) for the benefit of his employees and has not transferred the fund or any portion of it, transfers such fund or portion to trustees in trust for the employees participating in the fund, the amount so transferred shall be deemed to be of the nature of capital expenditure.

(2) When an employee participating in such fund is paid the accumulated balance due to him therefrom, any

portion of such balance as represents his share in the amount so transferred to the trustee (without addition of interest, and exclusive of the employee's contributions and interest thereon) shall be deemed to be an expenditure by the employer within the meaning of clause (*ix*) of sub-section (2) of section 10, incurred in the year in which the accumulated balance due to the employee is paid

See notes under section 10 (2) (*ix*) and in particular *British Insulated and Helsby Cables, Limited* v *Atherton*[10] set out under that section

The object of this section is to prevent an employer getting undue advantage in reducing his taxable income in a single year by the accident of his employee's provident fund being recognised in that year The deduction on account of past accumulations is therefore spread over several years and allowed gradually as employees receive their accumulations, the deduction being limited to the amount of the employer's share in the past accumulations at the time of recognition of the fund After the recognition, the contributions made every year by the employer will be allowed as a deduction from his taxable profits year by year

It should be specially noted that the section applies to all private provident funds whether recognised under this Chapter or not

Provisions relating to rules

58-L (1) All rules made under this Chapter shall be subject to the provisions of sub-sections (4) and (5) of section 59.

(2) In addition to any power conferred by this Chapter, the Governor-General in Council may make rules—

(*a*) prescribing the statements and other information to be submitted with an application for recognition ,

(*b*) limiting the contributions to a recognised provident fund by employees of a company who are shareholders in the Company ,

(10) 10 Tax Cas a 1**

(c) providing for the assessment by way of penalty of any consideration received by an employee for an assignment of, or creation of a charge upon, his beneficial interest in a recognised provident fund ;

(d) determining the extent to and the manner in which exemption from payment of income-tax and super-tax may be granted in respect of contributions and interest credited to the individual accounts of employees in a provident fund from which recognition has been withdrawn , and

(e) generally, to carry out the purposes of this Chapter and to secure such further control over the recognition of provident funds and the administration of recognised provident funds as he may deem requisite

Rules by Governor General in Council—

It will be noted that rules are made by the Governor General in Council under the Act in respect of this Chapter only All other rules are made by the Central Board of Revenue subject to the control of the Governor-General in Council

Sub-section (1)—

Sub section (4) of section 59 requires previous publication of the rules, and sub section (5) of section 59 to publication in the *Gazette of India* and to the rules having effect as if enacted in the Act

Sub section (2)—

(a) *See* rules set out under section 58 B

(b) **Rule 11**—Where an employee of a Company owns shares in the Company with a voting power exceeding ten per cent of the whole of such power the sum of the exempted contributions of the employee and employer to the recognised provident fund maintained by the Company shall not exceed Rs. 250 in any month

Extract from Select Committee's Report

' We have deleted the word 'private' before the word 'company' as in our opinion there may be cases of shareholders in public companies just as well as in private companies who should properly come within the scope of the clause We have been assured that it is the intention of Government that the rules to be framed under this provision will apply

only to employees who are shareholders holding a substantial portion of the shares of a company "

(c) **Rule 12**—If an employee assigns or creates a charge upon his beneficial interest in a recognised provident fund, the Income-tax Officer shall, on the fact of the assignment or charge coming to his knowledge, give notice to the employee that if he does not secure the cancellation of the assignment or charge within two months of the date of receipt of the notice the consideration received for such assignment or charge shall be deemed to be income received by him in the year in which the fact became known to the Income-tax Officer and shall be assessed accordingly

(d) **Rule 13**—If the Commissioner withdraws recognition from a recognised provident fund, the balance to the credit of each employee at the end of the financial year prior to the date of the withdrawal of recognition shall be paid to him free of income-tax and super-tax at the time when such employee receives the accumulated balance due to him The remainder of the accumulated balance due to him shall be liable to income-tax and super-tax as if the fund had never been recognised

58-M This Chapter shall not apply to any provident fund to which the Provident Funds Act 1925 applies

Application of this Chapter

Note—The provisions relating to funds to which the Provident Funds Act, 1925, applies are contained in sections 4 (3), 7 and 15

CHAPTER X

MISCELLANEOUS

59 (1) The Central Board of Revenue may, subject to the control of the Governor-General in Council make rules for carrying out the purposes of this Act and for the ascertainment and determination of any class of income. Such rules may be made for the whole of British India or for such part thereof as may be specified

Power to make rules

(2) Without prejudice to the generality of the foregoing power, such rules may —

(a) prescribe the manner in which, and the procedure by which, the income, profits and gains shall be arrived at in the case of—

(i) incomes derived in part from agriculture and in part from business,

(ii) insurance companies,

(iii) persons residing out of British India,

(b) prescribe the procedure to be followed on applications for refunds,

(c) provide for such arrangements with His Majesty s Government as may be necessary to enable the appropriate relief to be granted under section 27 of the Finance Act 1920, or under section 49 of this Act

(d) prescribe the year which, for the purpose of relief under section 49 is to be taken as corresponding to the year of assessment for the purposes of section 27 of the Finance Act, 1920, and

(e) provide for any matter which by this Act, is to be prescribed

[20](3) In cases coming under clause (a) of sub-section (2), where the income profits and gains liable to tax cannot be definitely ascertained, or can be ascertained only with an amount of trouble and expense to the assessee which, in the opinion of the Central Board of Revenue, is unreasonable, the rules made under that sub-section may—

(a) prescribe methods by which an estimate of such income profits and gains may be made, and

(b) in cases coming under sub-clause (i) of clause (a) of sub-section (2), prescribe the proportion of the income which shall be deemed to be income profits and gains liable to tax,

and an assessment based on such estimate or proportion shall be deemed to be duly made in accordance with the provisions of this Act

(20) Inserted by Act XXVIII of 1927

(4) The power to make rules conferred by this section shall, except on the first occasion of the exercise thereof, be subject to the condition of previous publication

(5) Rules made under this section shall be published in the Gazette of India, and shall thereupon have effect as if enacted in this Act

Rules—

With the exception of the rules first made under the Act, the power to make rules is, under section 59 (4), subject to the condition of 'previous publication'' The meaning of the phrase "subject to the condition of previous publication" is given in section 23 of the General Clauses Act (X of 1897), *viz* —

'Where by any Act of the Governor General in Council or Regulation a power to make rules or bye laws is expressed to be given subject to the condition of the rules or bye laws being made after previous publication then the following provisions shall apply namely —

(1) the authority having power to make the rules or bye laws shall, before making them publish a draft of the proposed rules or bye laws for the information of persons likely to be affected thereby

(2) the publication shall be made in such manner as that authority deems to be sufficient

(3) there shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration

(4) the authority having power to make the rules or bye laws shall consider any objection or suggestion which may be received by the authority having power to make the rules or bye laws from any person with respect to the draft before the date so specified

(5) the publication in the Gazette of a rule or bye law purporting to have been made in exercise of a power to make rules or bye laws after previous publication shall be conclusive proof that the rule or bye law has been duly made (*Income tax Manual* para 101)

History—

The Central Board of Revenue took the place of the Board of Inland Revenue in 1924 This section is radically different from the corresponding ones in the previous Acts, section 38 of the Act of 1886 and section 43 of the Act of 1918 Under these sections, the rules were made by the Governor General in Council and the power could be delegated to Local Governments The Central Board of Revenue cannot delegate this power

Sub-section (3)—

It is observed from the relative Statement of Objects and Reasons that in the absence of this sub section doubts had arisen

as to the validity of certain rules made under sub section (2) While sub section (2) gives powers only to describe "procedure" and "the manner in which" certain things could be done, the new sub section explicitly empowers the framing of rules to ascertain income when it cannot be easily ascertained The object of such arbitrary formula is convenience both to Revenue and to the assessee

Under section 3 the income to be taxed is that of the 'previous year' But Insurance Companies are taxed on the average profits of the previous valuation period—*see* Rules 25 *et seq* These rules might therefore be held to be *ultra vires* of the Act But few Insurance Companies can afford to have annual valuations made, and it is therefore convenient to them to be assessed otherwise than on the previous year's income Similarly in the assessment of incomes partly from agriculture and partly from business, it is more convenient to all concerned to have a simple formula for separating the income in each industry than to have an elaborate investigation on each individual assessment, which is the only other alternative open In the absence of the present sub section, such a formula might in some conceivable cases contravene section 4 (3) (*viii*), which exempts agricultural income

Agriculture and Business—

This section suggests that agriculture and business as contemplated by this Act—*see* definitions in sections 2 (1) and 2 (4)—are mutually exclusive categories, but see rulings cited in notes under section 2 (1) in connection with usufructuary mortgages and *R M M S T. Ponnusuami Pillai's case* set out under section 4 (2), holding that income from business may also be from agriculture

Scope of section—

If the rules are made and published in accordance with this section, they have the force of law and have effect "as if enacted in this Act" The section is clear on this point. But see also *Garnett* v *Bradley*,[21] *Branford* v *McAnully*,[22] *R* v *Walker*,[23] *Patents Agents Institute* v *Lockwood*,[24] and *Kandasami Pillai's* *Emperor* [25] But if the rules do not strictly comply with the section, they will be *ultra vires* The authority to make rules is given to the end that the provisions of the Act

(21) (1878) 3 A C 944
(22) (1883) 8 A C 456
(23) (1875) 10 Q B 355
(24) (1894) A C 347
(25) 42 Mad 69

may be better carried into effect and not so as to contradict or neutralise its provisions. Where a power to make regulations is given by a statute no regulations made under the statute can abridge a right conferred by the statute itself. Thus an assessee cannot be deprived of his right of appeal by the Central Board of Revenue not prescribing forms of appeals nor of his right to refund of tax by the Central Board of Revenue not appointing an Income tax Officer. But the rules would be *intra vires* if the Act expressly gave permission to the rule making authority to regulate and if necessary abridge the right. So long as the rules can be reconciled with the Act they will be construed to be *intra vires*.[27] If, as the result of objections received, the rules as finally made differ slightly from the first draft published, it would not matter.[28] But the draft rule may not be altered so substantially as to make it almost a new rule. *See also* the Introduction—"Rules of Construction".

It was ruled by the Lahore High Court in the case of the Lakshmi Insurance Company that though the provisions of section 59 were enabling provisions only, once a Rule had been made of a mandatory character, that rule must prevail and it would not be open to the Crown to rely on the ordinary provisions of the Act as an alternative.

For convenience of reference the rules framed under this section have been set out under each relevant section, and again in one place after the text of the Act.

60. (1) The Governor-General in Council may, by notification in the *Gazette of India*, make an exemption, reduction in rate or other modification, in respect of income-tax in favour of any class of income, or in regard to the whole or any part of the income of any class of persons.

Power to make exemptions etc.

(2) Where, by reason of any portion of an assessee's salary being paid in arrears or in advance, his income is assessed at a rate higher than that at which it would otherwise have been assessed the Governor-

(26) See *R.* v. *[illegible]*. Ex parte *[illegible]* (18[illegible]) [illegible] Q. B. [illegible]40; *Queen* v. *[illegible]* 17 Mad. 118; *Secretary of State* v. *[illegible]* 33 M[illegible] 117; *[illegible]* v. *[illegible]* [illegible] Mad. [illegible].

(27) See *[illegible]* v. *[illegible]* (1898) 1 Q. B. [illegible].

(28) *[illegible]* v. *Har Sarup* 34 All. 3[illegible].

General in Council may grant such relief as he may think fit

Individuals—Exemptions in favour of—Inadmissible—

'Other modification' cannot obviously be made *against* the subject The exemption or other favour can only be made in respect of a class of income or a class of persons The exemption cannot therefore be made in respect of individuals Also the exemption can be made only by notification in the *Gazette of India* The object of these provisions is, of course, to ensure that some public interest is secured by the exemptions

History—

Sub section (1) is practically the same as section 6 of the 1886 Act and section 44 of the 1918 Act Sub section (2) was inserted by Act XXII of 1930

Free of tax—

The Indian Income tax Act does not recognize contracts for payments 'free of tax' In such cases, the tax would be levied on the gross income of the recipient, and it would be a matter of arrangement between the contracting parties that the recipient is paid such gross income as would, after deduction of tax, leave him the stipulated nett income *See* notes under section 3

Exemptions by statute—

See section 4 (3) regarding complete exemptions given by the statute itself and the limited exemptions under proviso to section 7 (1), provisos to section 8, section 14, section 15 and section 17

See also the Introduction regarding exemptions conferred by statutes anterior to the Income tax Act

Double Income tax Relief—Indian States—

The Governor General in Council is pleased to make the following modifications in respect of income tax, in favour of income on which income tax has been charged both in British India and in one of the Indian States referred to in the Schedule to this notification (hereinafter called the said schedule), namely —

1 In this notification—

(*a*) the expression "State income tax" means income tax and super tax charged in accordance with the provisions of the law relating to income tax for the time being in force in the State concerned,

(b) the expression "State rate of tax" means the amount of State income tax divided by the amount of the larger of the two incomes on which income tax and super tax respectively have been charged by the State, and

(c) the expressions "Indian income tax" and "Indian rate of tax" have the same meanings as in clauses (a) and (b), respectively, of section 49 (2) of the Act

2 If any person who has paid Indian income tax for any year on any part of his income proves to the satisfaction of the Income tax Officer that he has at any time paid State income tax in respect of the same part of his income, he shall be entitled to the refund of a sum calculated on that part of his income at a rate equal to half the State rate of tax

Provided that the rate at which the refund shall be given shall not exceed one half of the Indian rate of tax

3 Every application for refund of income tax under this notification shall be made to the Income tax Officer of the district in which the applicant is chargeable directly to income tax, or if he is not chargeable directly to income tax, to the Income tax Officer for the district in which the applicant ordinarily resides, or if he is not resident in British India—

(i) to the Income tax Officer of the district or area in which he was last charged directly to income tax when so resident, or

(ii) if he has never been so resident, to the Income tax Officer of the district or area where the income tax for the refund of which application is made was deducted

Such application may be presented by the applicant in person or by a duly authorised agent or may be sent by post, and shall be in the following form —

Application for relief from double income tax under Notification No 25, dated the 1st July, 1926

I, of do hereby state that I have paid (name of State) State $\frac{\text{income tax}}{\text{Income tax and super tax}}$ amounting to Rs for the year ending 19 on an income of Rs and that Indian $\frac{\text{income tax}}{\text{income tax and super tax}}$ of Rs has also been paid on —

I now pray for relief at the rate to Rs under Notification No 25, dated the 1st July,

(29) Where the income on which income tax has been charged differs from that on which super tax has been charged, both amounts must be specified

1926, to which I am entitled. My income from all sources to which this Notification applies during the "previous year" ending on the 19 amounted to Rs only—*see* Return of income $\frac{\text{attached}}{\text{already submitted.}}$

Signature————————

I hereby declare that what is stated herein is correct

Signature————————

Dated——————19

4 No claim to any refund of Indian income tax under this Notification shall be allowed unless it is made within one year from the last day of the year in which such tax or the State income tax (Notifications No 25, I T., dated 1st July, 1926, No 22, I T, dated 9th June, 1928, No 28, I T, dated 28th June 1930, and No 40, I T, dated 26th July, 1930) was recovered whichever is later

SCHEDULE

1 Baroda

Madras States Agency

2 Travancore

Central India Agency

3 Dhar

Punjab States Agency

4 Patiala
5 Bahawalpur
6 Jind
7 Kapurthala
8 Loharu
8 A Maler Kotla (Notification No 12, dated 7th April, 1928)
8 B Mandi (Notification No 42 dated 2nd August, 1930)

Bombay

9 Sachin
10 Akalkot
11 Phaltan
11 A Chhota Udepur (Notification No 30, I T, dated 28th July, 1928)
11 B Ramdurg

United Provinces

12 Benares

Central Provinces

13 Bastar
14 Kanker
15 Raigarh
16 Jashpur

17 Sarangarh
18 Makrai
19 Kawardha
20 Khairagarh
21 Korea
22 Nandgaon
23 Chhuikhadan

Bihar and Orissa

24 Mayurbhanj
24-A Patna
24 B Sonpur
24 C Kalahandi
24 D Rairakhol
24 E Baudh

Punjab

25 Baghat (Notification No 28 dated 2nd July 1927)

(Notification dated 1st July 1928)

Exemptions—

In addition to the exemptions mentioned in section 4 (3), the following further exemptions have been made by the Governor General in Council in exercise of the powers conferred by section 60 of the Act

' The following classes of income shall be exempt from the tax payable under the said Act and they shall not be taken into account in determining the total income of an assessee for the purposes of the said Act (Notification No 878 F, dated 21st March 1922, except where otherwise stated) —

(1) The official allowance which an agent of a Prince or State in India who has been duly accredited to represent the Prince or State for political purposes in any place within the limits of British India, receives as such agent in British India from the Prince or State *and the official salaries and fees* received in India from their Governments by Foreign Consuls, whether *'de carriere* or not and whether foreign or British subjects and by Representatives and Consular *employees* (whether foreign or British subjects), who are members of a permanent consular service

(The latter portion of this exemption applies only to salaries and fees received from their Governments and not to any other income, profits or gains accruing or arising to them or received by them in British India) (Notification No 21, dated 10th June, 1926)

(2) The salary and allowances paid by a State in India during the period of deputation to any person deputed by the State for training in British India

(3) Scholarships granted to meet the cost of education

(4) Such portion of the income of a member of His Majesty's Naval, Military or Air Forces, British or Indian, or of the Royal Indian Marine as is compulsorily deducted from his salary by the orders, or with the approval of Government for payment to a mess, wine or band fund (Notification No 3865, dated 26th August, 1924)

(5) The allowances attached to—
The Victoria Cross
The Military Cross
The Order of British India
The Indian Order of Merit

(5 A) 'Jangi Inams' awarded to Indian officers, Indian other ranks and followers in respect of services in the Great War (Notification D Dis No 1084—I T 25, dated 21st October, 1925)

(6) The interest on Government securities held by Ruling Chiefs and Princes of India, as the property of their States, in the special non transferable form of Government promissory notes

(7) The yield of Post Office cash certificates

(8) The interest on deposits in the Post Office Savings Bank

(9) The income of a University or other educational institution existing solely for educational purposes and not for purposes of profit (Notification No F 266—I T 25, dated 25th March, 1925)

(10) The salary of His Majesty's Trade Commissioners in India

(10 A) The salary of the Canadian Government Trade Commissioner in India at Calcutta (1929)

(10 B) The salary of the Trade Commissioner in India of the United States of America, and of any members of his staff who are citizens of the United States of America and have been detailed for duty with the said Trade Commissioner by the Government of the said States (Notification No 43, dated 20th October, 1928)

(10-C) The salaries of the Correspondent of the International Labour Office, New Delhi, and his staff (Notification No 13, dated 3rd August, 1929)

(11) The gratuities which are granted to officers and others in respect of wounds or injuries received either in action or in the performance of duty otherwise than in action in His Majesty's Naval, Military or Air Forces, British or Indian or in the Auxiliary Force, India, or in the Royal Indian Marine (Notification No 3865, dated 26th August, 1924)

(12) The gratuities which are granted to the widows, children or other relatives of officers and others who are killed in action or suffer violent death due directly or wholly to war service, or are killed or die of injuries sustained on flying duty or while being carried on duty in aircraft under proper authority, or die within seven years from wounds or injuries so received

(13) Retiring gratuities with increments thereto granted under the rules framed by the Secretary of State in Council in pursuance of the Royal Warrant, dated the 25th April, 1922

(14) Gratuities sanctioned under Army Instruction (India) No 223, dated the 21st March, 1922, for regular Royal Engineer Officers on the Indian establishment belonging to the Survey or Railway Department and regular Indian Army Officers of the Survey Department (Notification No 1910, dated 27th May 1924)

(15) Gratuities granted to Assistant Surgeons of the Indian Medical Department in military employment declared surplus to establishment under Army Instructions (India) No 516 of 1924

(16) Gratuities which are granted by the Railway Board or under general orders issued by the Railway Board to employees on their retirement or discharge from service or in the event of their death while in service to their widows or children or other members of their families (Notification No 184-S, dated 25th November 1922)

(17) Extraordinary gratuities which are granted by Government or by Railway Administrations to Government or railway servants (or to their widows, children or other representatives as the case may be) who are injured or killed in the execution of their duties or who suffer injury or death owing to devotion to duty (*Ibid*)

(18) The allowance or salaries paid in the United Kingdom to officers of Government on leave or duty in that country whether such allowance or salary is paid in sterling in the United Kingdom or by means of negotiable rupee drafts on a bank in India (Notification No 10, dated 25th March, 1926)

(19) The leave allowance or salary drawn from any Colonial Treasury by officers of Government on leave or duty in the Colony (Notification No 42, dated 20th November, 1926)

(19 A) Leave salaries or leave allowances paid in the United Kingdom or in a Colony, to officers of local authorities, or to the employees of Companies, or of private employers on leave in the United Kingdom or in such Colony (Notification C No 1205—I T 25, dated 4th February, 1926 and No 42, dated 20th November, 1926)

(19 B) Vacation salaries paid in the United Kingdom or in a Colony to Judges of High Courts or of Chief Courts, to Judicial Commissioners, or to other officers of Government, when on vacation therein (Notification No 10, dated 25th March, 1926)

(19 C) * * * *

(19 D) The value of the free education provided for the children of British Warrant and Non Commissioned Officers and any grants in aid made to British Warrant and Non Commissioned Officers in lieu of the provision of free education for their children (Notification No 2, dated 21st January, 1928)

(20) The pensions of officers of Government residing out of India drawn from any Colonial Treasury or paid in the United Kingdom, whether such pensions are paid in sterling or by means of negotiable rupee drafts on a bank in India (Notification No 42, dated 20th November, 1926)

(21) The salaries of the lighthouse keepers of lighthouses in the Red Sea (Notification No 4464, dated 25th September, 1924)

(21 A) The pensions paid in the United Kingdom or in a Colony to officers of local authorities or employees of companies or of private employers, such officers or employees being resident out of India (Notification No 42, dated 20th November, 1926)

(22) The interest on Mysore Durbar Securities (Notification No 93 S, dated 25th July, 1922)

(23) Pensions granted to officers of His Majesty's Naval, Military or Air Forces, British or Indian, or of the Auxiliary Force, India, or of the Indian Territorial Force, or of the Royal Indian Marine in respect of wounds or injuries received in action or in the performance of their duties as members of such forces otherwise than in action (Notification No 3865, dated 26th August, 1924)

(24) Pensions granted to members of His Majesty's Naval, Military or Air Forces, British or Indian, or of the Auxi

liary Force, India, or of the Indian Territorial Force, or of the Royal Indian Marine, who have been invalided from service with such forces on account of bodily disability attributable to, or aggravated by, such service (*Ibid.*)

(25) Value of rations issued in kind or money allowances paid in lieu thereof, to any officer or other rank in His Majesty's Naval, Military or Air Forces, British or Indian, or in the Auxiliary Force, India, or in the Indian Territorial Force, or in the Royal Indian Marine (Notification No 3865, dated 26th August, 1924)

(25 A) Value of rent free quarters occupied by, or money allowances paid in lieu thereof, to Indian officers, British Warrant and non commissioned officers and men of His Majesty's Military or Air Forces, and British and Indian Warrant officers of His Majesty's Naval and Marine Forces, in all cases irrespective of whether the individual concerned is married or single (Notifications No 30, dated 6th August, 1926 and No 35, dated 25th August, 1928)

(25 B) Conservancy allowance granted in lieu of free conservancy to non departmental Warrant and non commissioned officers of the India Unattached List, departmental non commissioned officers of the Indian Unattached List not in receipt of consolidated rates of pay and Warrant and non commissioned officers of the permanent staff of the Auxiliary and Territorial Forces (Notification No 43, dated 20th November, 1926)

(26) The income of persons, other than persons in the service of the Government, residing in the district of Angul. (Notification No 148, dated 28th May, 1923)

(27) The perquisite represented by the right of any of the officers specified in the annexed list to occupy free of rent as a place of residence any premises provided by Government

List of Officers

The Governor General

The Commander in Chief

The Governor of a Governor's Province

The Chief Commissioner of any of the following Provinces, namely —

The North West Frontier Province,
British Baluchistan,
Delhi,
Ajmer Merwara,
Coorg,

and the Andaman and Nicobar Islands (Notification No F 72, I T 25, dated 16th April, 1925), and

any first class Resident in the Political Department (Notification No C 509—I T 25, dated 12th October, 1925)

(28) Retiring gratuities with increments thereto granted under the rules framed by the Secretary of State in Council in pursuance of the Royal Warrant, dated the 25th April, 1922 (Notification No 46 S, dated 23rd June, 1922)

(29) Gratuities granted to Assistant Surgeons of the Indian Medical Department in military employment declared surplus to establishment under Army Instruction (India) No 516 of 1924 (Notification No 60, dated 5th January, 1925)

(30) The lump sum grants made by Government to the Indian church—(1) for the provision of episcopal supervision and ministrations, (2) for the payment of allowances to clergymen entertained in lieu of chaplaincies reduced, and (3) in lieu of the grants in aid at present given for the entertainment of clergymen of the Additional Clergy Society under Articles 602 and 603 of the Civil Service Regulations (1930)

The following classes of income shall be exempt from the tax payable under the said Act, but shall be taken into account in determining the total income of an assessee for the purposes of the said Act —

(1) The interest on Government securities purchased through the Post Office and held in the custody of the Accountant General, Posts and Telegraphs (Notification No 878 F, dated 21st March, 1922)

(2) Sums received by an assessee on account of salary, bonus, commission or other remuneration for services rendered, or in lieu of interest on money advanced, to a person for the purposes of his business,

where such sums have been paid out of, or determined with reference to, the profits of such business,

and, by reason of such mode of payment or determination, have not been allowed as a deduction but have been included in the profits of the business on which income tax has been assessed and charged under the head "business"

Provided that such sums shall not be exempt from the payment of super tax unless they are paid to the assessee by a person other than a company and have already been assessed to super tax (Notification No 8, dated 24th March, 1928)

(3) The profits of any Co operative Society other than the Sanikatta Salt owners' Society in the Bombay Presidency

for the time being registered under the Co operative Societies Act, 1912 (II of 1912), the Bombay Co operative Societies Act, 1925 (Bombay Act VII of 1925) or the Burma Co operative Societies Act, 1927 (Burma Act VI of 1927) or the dividends or other payments received by the members of any such Society on account of profits (Notifications R Dis. No 291—I T 25, dated 25th August, 1925, and No 26, dated 25th June, 1927)

(4) No income tax shall be payable by an assessee in respect of such part of the profits or gains of a firm which has discontinued its business, profession or vocation as is proportionate to his share in the firm at the time of such discontinuance, if tax has at any time been charged on such business, profession or vocation under the Indian Income tax Act, 1918 (VII of 1918), or if an assessment has been made on the firm in respect of such profits or gains under sub section (1) of section 25 of the Indian Income tax Act, 1922 (XI of 1922)

Provided that such part of the profits or gains shall be included in computing the total income of the assessee (Notification No 21, dated 12th October, 1929)

Such part of income in respect of which the said tax is payable under the head "Property" as is equal to the amount of rent payable but not paid by a tenant of the assessee, where—

(*a*) the tenancy is *bona fide*,

(*b*) the defaulting tenant has vacated, or steps have been taken to compel him to vacate, the property,

(*c*) the defaulting tenant is not in occupation of other property of the assessee, and

(*d*) the assessee has taken all reasonable steps to institute legal proceedings for the recovery of the unpaid rent

The income so exempted shall be excluded in computing the total income of the assessee (Notification No 30, dated 30th November, 1929)

As regards item (2) immediately preceding, which relates to payments to employees depending on the profits of the employer, *see* section 10 (2) (viii *a*) and notes thereunder

As regards item (3), *see* the rulings in the Madras Central Urban Bank case and the English and Scottish Wholesale Co-operative Society's case set out under section 3

Meaning of profits in above Notifications—

The exemption which extends both to income tax and super tax applies only to "profits" in the strict sense of the word as used in the Act and does not include "income" derived by Co-operative Societies from interest on securities or dividends The Societies whose income

liable to income tax is not taxable at the maximum rate or who have no income liable to tax should apply to the Income tax Officer concerned for the issue of exemption certificates authorising persons paying interest on securities not to deduct any tax at source or to deduct tax at a lower rate than the maximum as the case may be

Apart from the particular cases of Co-operative Societies and of Government securities purchased through the Post Office and held in the custody of the Accountant General, Posts and Telegraphs in incomes or portions of incomes exempted under section 4 of the Act and under the orders of the Governor General in Council under *section 60 of the Act* referred to above are not only not subject to income tax or super tax but they are also not to be taken into account in determining the rate of tax on other income they are excluded from consideration altogether (*Income tax Manual para 17*)

Depreciation—Railways and Tramways—

The following modification has been made in respect of income tax in favour of income derived from railway or tramway business (other than an electric tramway) —

An assessee deriving income from a railway or tramway business may at his option require that in computing the profits or gains of such business the following allowance shall be made in lieu of the allowances specified in clause (*v*), clause (*vi*) and clause (*vii*) of sub section (2) of section 10 of the said Act namely, the actual expenditure incurred by the assessee during the previous year on repairs, replacements and renewals of plant machinery, buildings and furniture which are the property of the assessee

Provided that an assessee who in any year has exercised the option hereinbefore conferred shall not be entitled save with the consent of the Commissioner of Income tax to withdraw that option in any subsequent year

Provided further that nothing in this notification shall apply to an electric tramway (Notification No 23, dated 11th June, 1927)

Colony or Colonial Treasury—

The Colony need not necessarily be outside Asia The definition of 'Colony' in section 3 (11) of the General Clauses Act (X of 1897) is as follows shall mean any part of Her Majesty s dominions, exclusive of the British Islands and of British India, and where parts of these dominions are under both a central and a local legislature, all parts under the Central Legislature shall, for the purposes of this definition, be deemed to be one colony "

61 Any assessee, who is entitled or required to attend before any Income-tax authority in connection with any proceedings, under this Act, may attend either in person or by any person authorised by him in writing in his behalf

Appearance by authorised representative

History—

This is a new provision introduced in the 1922 Act The idea is to offer all possible facilities to the assessee in being represented in assessment and other proceedings

Power of attorney—

Any person may appear on behalf of the assessee, not necessarily a Lawyer or an Accountant as in England If the representative is not empowered with a formal power of attorney, his action or appearance before the Income tax authority may not bind the assessee, it will be for the Income tax authority to decide with reference to the circumstances in each case how far the representative can bind the assessee

When Income-tax Officer requires personal appearance of an assessee—

The permission given by this section to an assessee to be represented either in person or by an authorised agent does not affect the right of the Income tax Officer acting as a Court under section 37 to summon the assessee personally, should the Income-tax Officer decide to do so If the Income tax Officer decides to summon the assessee personally he should follow the procedure laid down in the Civil Procedure Code for the summoning of a witness An ordinary notice under one of the sections of the Income tax Act would not be sufficient In response to such a notice, the assessee would be entitled to send an authorised agent to represent him It is only when he is personally summoned under section 37 that the assessee is bound to appear in person

Receipts to be given

62 A receipt shall be given for any money paid or recovered under this Act

63 (1) A notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a Court, under the Code of Civil Procedure, 1908

Service of notices

liable to income tax is not taxable at the maximum rate or who have no income liable to tax should apply to the Income tax Officer concerned for the issue of exemption certificates authorising persons paying interest on securities not to deduct any tax at source or to deduct tax at a lower rate than the maximum, as the case may be

Apart from the particular cases of Co operative Societies and of Government securities purchased through the Post Office, and held in the custody of the Accountant General, Posts and Telegraphs, in incomes or portions of incomes exempted under section 4 of the Act and under the orders of the Governor General in Council under section 60 of the Act referred to above are not only not subject to income tax or super tax but they are also not to be taken into account in determining the rate of tax on other income, they are excluded from consideration altogether (*Income tax Manual* para 17)

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Provided that an assessee who in any year has exercised the option hereinbefore conferred shall not be entitled save with the consent of the Commissioner of Income tax to withdraw that option in any subsequent year.

Provided further that nothing in this notification shall apply to an electric tramway (Notification No 23, dated 11th June, 1927)

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61 Any assessee, who is entitled or required to attend before any Income-tax authority in connection with any proceedings, under this Act, may attend either in person or by any person authorised by him in writing in his behalf

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When Income-tax Officer requires personal appearance of an assessee—

The permission given by this section to an assessee to be represented either in person or by an authorised agent does not affect the right of the Income tax Officer acting as a Court under section 37 to summon the assessee personally, should the Income tax Officer decide to do so If the Income tax Officer decides to summon the assessee personally he should follow the procedure laid down in the Civil Procedure Code for the summoning of a witness An ordinary notice under one of the sections of the Income tax Act would not be sufficient In response to such a notice, the assessee would be entitled to send an authorised agent to represent him It is only when he is personally summoned under section 37 that the assessee is bound to appear in person

Receipts to be given

62 A receipt shall be given for any money paid or recovered under this Act

Service of notices

63 (1) A notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a Court, under the Code of Civil Procedure, 1908

(2) Any such notice or requisition may, in the case of a firm or a Hindu undivided family, be addressed to any member of the firm or to the manager, or any adult male member of the family and in the case of any other association of individuals, be addressed to the principal officer thereof

History—

Corresponds to section 46 of the 1886 Act and section 46 of the 1918 Act The reference to "any other association of individuals" was made by Act XI of 1924

By Post—

The words "by post" under section 27 of the General Clauses Act (X of 1897) mean "by registered post"

Notice—How to be served—Alternative forms—

This section does not require that service of a notice must be by its being placed in the hands of the person named therein by the officer of the court and does not exclude 'other forms of service' permitted by Order 5 of the Civil Procedure Code[30]

The section is permissive and not exhaustive, and it is open to the Income tax Officer to adopt any method of service that is effective so long as the assessee is not prejudiced thereby Thus the signature on the margin of an order sheet of the Income tax Officer by the assessee would be equivalent to due service of notice[31]

Similarly, the service of a notice under section 22 (4) for the production of certain accounts on the gomastha of the assessee who produced certain other accounts before the Income tax Officer, was held to be valid service in *Jangi Bhagat Ramavatar v Commissioner of Income tax, Bihar and Orissa*[32]

An Income tax Inspector went several times to the place of business of an assessee to serve a notice in person on his agent but the agent was away and his assistants would not give any information as to his whereabouts The Inspector had reason to believe on other information which reached him that the agent was avoiding the notice and thereupon posted the notice on the door of the business premises and made an affidavit before the

(30) Per Hallifax A J C, Nagpur, in *Ismail Bhai v Government*, 1 I T C 19

(31) *Ramkhelawan Ugamlal v Commissioner of Income tax, Bihar and Orissa* 3 I T C 225

(32) 3 I T C 418

Income tax Officer as to the service of notice The Income tax Officer then declared that the notice had been properly served Held, that the service was legal and that it was immaterial when the agent actually saw or obtained the notice[32a]

Under Rule 12 of Order V and Rule 3 of Order III of the Civil Procedure Code service on a recognised agent is sufficient and had the same effect as service on the principal unless the Income tax Officer otherwise directs Authority to accept service on behalf of a principal can be implied from the nature of the agent's duties, and in the case of a recognised agent carrying on the business of the principal, this is well implied because the acceptance of the notice is connected with the business[32b]

See Appendix as to how summonses are to be served under the Civil Procedure Code

Failure to serve a notice in strict accordance with this section renders subsequent proceedings void—see *Emperor* v *Ramcharan*[33] cited under section 51, also *Berry* v *Farrow*[34], but if there is evidence to show that in whatever manner the notice was served, it did in fact reach the person, the subsequent proceedings would probably be *intra vires*

Partners of firms—

A notice under section 23 (2) need not be served on the particular partner of a firm who signed the return under section 22 (2)[35]

Notice need not specify section of Act—

It was ruled in *Ramkhelawan Ugamlal* v *Commissioner of Income tax, Bihar and Orissa*,[36] that a notice is not bound to state the section or sections under which it is issued and that in the absence of this detail the notice is not illegal

Hindu undivided family—

Sub section (2) does not override sub section (1), the word used is only 'may' and not 'shall', it only enables the notice to be served on a single person instead of several, which might be necessary otherwise There is nothing therefore to prevent a notice being served under sub section (1) on an agent of a Hindu undivided family doing business The second sub section

(32a) *S P N C T Chettiyar Firm* v *Commissioner of Income tax Burma*

(32b) *Sundarmal* v *Commissioner of Income tax Bihar and Orissa*

(33) 49 I C 781

(34) (1914) 1 K B 632

(35) *Commissioner of Income tax* v *Chidambara Nadar* 2 I T C 27

(36) 3 I T C 225

is not surplusage, since it fastens personal responsibility so that the penal provisions of section 51 can be set in operation[37]

64 (1) Where an assessee carries on business at any place, he shall be assessed by the Income-tax Officer of the area in which that place is situate or, where the business is carried on in more places than one, by the Income-tax Officer of the area in which his principal place of business is situate

Place of assessment

(2) In all other cases an assessee shall be assessed by the Income-tax Officer of the area in which he resides

(3) Where any question arises under this section as to the place of assessment, such question shall be determined by the Commissioner, or, where the question is between places in more provinces than one, by the Commissioners concerned, or, if they are not in agreement, by the Central Board of Revenue

Provided that, before any such question is determined, the assessee shall have had an opportunity of representing his views

(4) Notwithstanding anything contained in this section, every Income-tax Officer shall have all the powers conferred by or under this Act on an Income-tax Officer in respect of any income, profits or gains accruing, or arising or received within the area for which he is appointed

The determination of the Income-tax Officer by whom an assessment is to be made—

If an assessee whom an Income tax Officer is seeking to assess challenges his jurisdiction on the ground that the assessee's principal place of business or residence is in a different income tax circle, the Income tax Officer should at once report the case to the Commissioner for orders Even if the Income tax Officers of the various circles concerned are in agreement as to the proper place of assessment, they are not competent to decide finally where the assessment should be made unless the assessee acquiesces in their decision If he disputes it and the alternative places

(37) *Commissioner of Income tax v V D M R M Chettyar, 2 I T C 474*

of assessment are all in the same Province, the Commissioner of Income tax of that Province can finally determine the place of assessment If alternative places of assessment are not situated in the same Province, it is not necessary for the Commissioners to refer the case to the Central Board of Revenue, unless they hold different views

It is not necessary for an assessee who disputes the jurisdiction of the Income tax Officer either to move the Commissioner himself or to ask the Income tax Officer to do so Whatever the assessee does or proposes to do, therefore, the Income tax Officer should take the Commissioner's orders at once whenever his jurisdiction is challenged

As the question of jurisdiction must be decided before any assessment can be made, the Income tax Officers and Commissioners should deal with all questions arising under section 64 as expeditiously as possible (*Income tax Manual*, para 105)

See also notes under section 5

History—

Corresponds to section 47 of the 1886 Act and section 47 of the Act of 1918 The previous Acts only provided for the declaration of the principal place of business when business was carried on at several places The present section definitely determines the place of assessment for every class of assessee The Calcutta High Court decision in *Hajee Adam v Secretary of State*[38] (under the 1886 Act) which ruled that the corresponding provision in that Act applied only to firms, is now obsolete, as the section in the present Act is completely changed

It will be noticed that this section is to some extent modelled on section 20 of the Civil Procedure Code

Concurrent jurisdiction—

The provisions of the fourth sub section do not oust the jurisdiction of the Income tax Officer of the principal place of business to assess the profits of a branch business in an area in the jurisdiction of another Income tax Officer In such cases both Income tax Officers have jurisdiction[39] It is open, therefore, to the Income tax Officer at the principal place of business to call for the accounts of branches irrespective of whether they have been produced before the local Income tax Officers or not and of whether the branches have submitted returns of income to them Further, the Income tax Officer at the principal place of business

(38) 5 C W N 207

(39) *Lachhman das Baburam v Commissioner of Income tax* 2 I T C 35

is not bound to accept the reports, if any, made by the Income tax Officers at the branches and need not refer back to them the points on which he is not prepared to accept their reports [40]

The same income cannot of course be taxed twice—once by the Income tax Officer of the branch and again by the Income tax Officer of the principal place of business [41] If the Income tax Officer of a branch, instead of merely making a report to the Income tax Officer of the principal place of business, makes a final assessment himself in respect of the income within his jurisdiction, it would seem to be still open to the Income tax Officer of the principal place of business to assess the branch income on a footing different from that assessed by the Income tax Officer of the branch [42]

The obligation to make a return at the principal place of business is not discharged by filing returns before the Income tax Officers at the branches, and it is therefore open to the Income tax Officer of the principal place of business to assess under section 23 (4) in the absence of a return without waiting for reports from the Income tax Officers of the branches [42a]

Opportunity—

If the assessee is not given an opportunity the assessment will not be in accordance with the Act, and a fresh assessment will be necessary after giving the assessee an opportunity to represent his views His views are not bound to be accepted, nor has he a right of appeal It is only if the Commissioners are not in agreement that the question need be referred to the Central Board of Revenue If the Commissioners agree, the assessee must abide by their decision But in all cases he has the right to represent his point of view to the Commissioner, i e, even if the Income tax Officers are agreed While therefore the assessee must abide by the decision of the Commissioners where they agree, he is not similarly bound by the opinion or orders of the Income tax Officers even if they are in agreement

Principal place of business—

The law does not define the expression It is essentially a question of fact which is the principal place of business in a

(40) *Lachhmandas Baburam* v *Commissioner of Income tax U P*, 4 I T C 61

(41) *Ramkhelawan Uganlal* v *Commissioner of Income tax Bihar and Orissa* 3 I T C 225

(42) Cf *L R M S T Firm* v *Commissioner of Income tax Burma* 3 I T C 416

(42a) *Mohanlal Hardeodas* v *Commissioner of Income tax Bihar and Orissa* 9 Pat 172.

given case 'Principal' is a vague word and involves only a relative concept This idea of the principal place of business is really the English theory of 'control' stated somewhat differently, the difference being that there can be only one principal place of business though there can be more than one place of control Various considerations would have to be taken into account and balanced against each other before it can be decided which is the principal place of business in a particular case Such balancing involves the determination of questions of degree and therefore questions of fact In accordance with the general scheme of the Act, therefore, it has been left to be decided by the Revenue authorities in each case which is the principal place of business Questions of law can arise only if the authorities decide without evidence to justify their findings Relevant considerations would be where the partners reside and which among them have the real control, where the accounts are kept of the business as a whole, which is the parent business out of which the business has grown, where, in the case of a company, the registered office is located, whether the business at any place is conducted with partners and at other places without partners, where the finance is arranged, and contracts entered into, where the goods are actually manufactured and sold; and so forth, and most of these considerations are relevant only in ascertaining where the effective control is exercised The object of giving the assessee an opportunity to state his view is partly to help him to decide where he can most conveniently appear before the Department and look after his interests, and partly to safeguard the secrecy of his business matters Ordinarily the principal would not like a branch manager of his to see all his accounts The section therefore says that *the assessment shall be made at the principal place of business* If the principal, to suit his own convenience, resides at some other place, that would be no reason for not making the assessment at the principal place of business, but the assessment must be made at the principal place of business in order to give the assessee facilities for producing accounts and documents and representing his interests and also to guard the secrecy of his accounts

The mere fact that goods are manufactured or sold at a place will not make that place the principal place of business, nor the fact than an expert partner or partners on whom the efficient conduct of the business largely depends resides or reside at a particular place, while the financing and contracts are regulated elsewhere The relative volume of transactions and pro-

fits will in themselves prove nothing[43] Their relevancy comes in only incidentally helping to decide where the real control is exercised It is conceivable that the principal place of business may be a place where the business may be making an actual loss, large profits being made elsewhere, or a place where goods are neither bought nor sold but effective control is exercised

In connection with the service of a writ which had to be made at the "principal office" of a company, it was held by Lord Campbell, C J, in *Garton v Western Ry*,[44] that

> The words principal office' indicate one particular office for the whole line not an office for the traffic station "

This was followed in *Palmer v Caledonian Ry*[45] in which Lord Esher, M R, said —

> "I should have thought without any authority that the 'principal office of the company must be the place at which the business of the Company is controlled and managed "

and Lopes, L J, said —

> ' What I understand by principal office' is that office where the general superintendence and management of the business is carried on '

In this connection attention may be invited to the decisions (1) which declare that the carrying on of a business is a question of fact—*see* notes under section 2 (4), (2) which declares that carrying on business or exercising a trade in a particular place is also a question of fact—*see* notes under section 4 (1) *A fortiori* it would seem that the question which is the *principal* place of business is also a question of fact As already stated, the concept involves the added factor of relativity which can only be a matter of degree or opinion and therefore essentially a question of fact

Partners of firms—

The expression "place of business" is not restricted to places where an assessee carries on business individually, but includes places where he carries on business as a partner in a firm Stress should not be laid on the use of the word 'assessee' in section 64, and it is in fact inappropriate, since a person cannot become an "assessee" within the meaning of section 2 (2) of the Act *until* he has been assessed Moreover, though a partner in a firm cannot become an "assessee" in respect of his income from the firm so long as the firm is assessed he has none the less to be "assessed" in respect of it The verb to "assess" can only

(43) *Dina nath Hemraj v Commissioner of Income tax*, 2 I T C 304
(44) 1 B & E 837
(45) (1892) Q B D 523

mean to ascertain the amount of a person's income in order to determine whether he is liable to tax (and if so at what rate and in what sum) or not

Take the case of a person residing in Madras, who is a partner in registered firms at Calcutta, Bombay and Rangoon and has no other business Each firm has a principal place of business, but one of the three has to be selected as the principal place of business of the person who is a partner in all the three firms Similarly, when a person is a partner in a firm and carries on business independently of the firm, it has to be determined whether the principal place of business is the place where the person carries on business individually or the place where he carries on business as a partner in a firm It does not follow that the principal place of business of a firm is also the principal place of business of each partner in the firm

Procedure—Opportunity to assessee—

No procedure has been prescribed as to how the questions that arise under this section should be dealt with When any question arises under this section, *i e*, if the Income tax Officers concerned differ or, even if they agree, the assessee does not, the Income tax Officer should refer the matter *suo motu* to the Commissioner,[46] but there is nothing to prevent the assessee approaching the Commissioner if he so chooses The Commissioner or the Central Board of Revenue, as the case may be, should give the assessee an opportunity of stating his views as to where and why he would like to be assessed, before deciding as to the principal place of business So long as such opportunity has been given, the decision of the Commissioner or the Central Board of Revenue, as the case may be, is final

Effect on assessment proceedings pending settlement—Principal place of business—

If an assessee declines to produce his branch books called for under a notice issued under section 22 (4) for inspection by the Income tax Officer of the principal place of business on the ground that it is not convenient to do so, an assessment by the Income tax Officer of the principal place of business under section 23 (4) would not be illegal[46] Whether the Income tax Officer should re open the assessment under section 27 or not would depend on whether the assessee was prevented by sufficient cause from producing the books, *i e*, on the circumstances of each case. But if an Income tax Officer assesses a person whether under section 23 (4) or under section 23 (3)—when a question under sec-

(46) *Lachhmandas Baburam v Commissioner of Income tax*, 2 I T C 35

tion 64 is pending, his proceedings are irregular[47] He should wait till the question under section 64 is decided by the relative authority—the Commissioner or the Central Board of Revenue, as the case may be—before making the assessment But it is clearly open to the Income tax Officer to go on under section 64 (4) with the assessment of that part of the income arising or accruing or received in his jurisdiction

Resides—

As regards the meaning of this word, *see* notes under section 4 (2) The question of residence will arise under section 64, only if the assessee is *not* carrying on a business If he does, the principal place of business settles the place of assessment and not the residence, no matter whether the assessee be an individual, firm or company If an assessee who is not carrying on business has more than one residence, the Income tax Officer at any of the places of residence can assess him The law does not require the Income tax Officer of the principal place of residence, *i e*, of ordinary residence to assess But whether the assessee carries on business or not, sub section (3) will apply

United Kingdom Law—

In the United Kingdom, in cases in which there is a possible conflict of jurisdiction, one way of settling the doubt is by an application to the High Court for a Writ of Prohibition, but there is a provision authorising the Board of Inland Revenue to decide in cases of doubt in which parish an assessee should be assessed—*see* section 97 of the Act of 1918

65 Every person deducting, retaining or paying any tax in pursuance of this Act in respect of income belonging to another person is hereby indemnified for the deduction, retention or payment thereof

Indemnity

Scope of section—

Before any person can seek relief from Government on account of this indemnity, he must actually lose something as a consequence of his having deducted, retained or paid the tax See *Collinge* v *Haywood*[48] The indemnity will, of course, cover only such acts as were made *bona fide* and in accordance with the Act, and the question whether any one else committed default or not would be irrelevant to the indemnity The liability of

(47) *Dinanath Hemraj* v *Commissioner of Income tax* 22 I T C 304
(48) 8 L J Q B 98

Government is conterminous with that of the person deducting and paying the tax and will be neither more nor less

History—

There were indemnity sections in previous Acts also *See* section 49 of the 1886 Act and section 48 of the 1918 Act Such a provision is obviously necessary in all systems in which tax is deducted 'at source '

Operation outside British India—

This indemnity provision however is of no use outside British India unless there be a definite contract to that effect between the parties concerned Payment of Indian Income tax to the Indian Government on behalf of a third person will not enable the person deducting tax at source to claim under the law of a foreign country a discharge of an equivalent corresponding debt In British India, of course, he automatically gets the discharge, but if the contract between the person deducting tax and the person from whom it is deducted is under foreign law and to pay a specified rate of interest in the foreign country, this indemnity is of no help A company in British India which raises debentures outside the interest on which is payable outside and the contract relating to which is governed by the law of a foreign State cannot deduct Indian Income tax from the foreign debenture holder in the absence of a contract to that effect But it is doubtful whether in such cases the interest accrues or arises in British India and therefore whether the interest is taxable at all (*See* notes under section 4) Similarly, a company paying interest on debentures in British India cannot in the absence of a contract to that effect claim to deduct from such interest tax paid by it elsewhere, and if it does so deduct, indemnity under this section will be of no avail[49] The point to be borne in mind is that the British Indian Legislature is interested only *in the collection of British Indian tax, and British Indian* Courts are concerned only with British Indian Taxing Acts Neither the British Indian Legislature nor the British Indian Courts have any interest in enforcing the collection of foreign taxes

As regards the enforcement in one country of Revenue, etc, laws of another, see *Attorney General for Canada* v *Schultz*[50] and Re *Visser, Queen of Holland* v *Drukker and others*[1]

(49) See *India and General Investment Trust* v *Borax Consolidated* (1920) 1 K B 539 also *London & South American Investment Trust* v *British Tobacco Co (Australia)* 42 T L R. 771 (1927) 1 Ch 107

(50) 9 S L T 4

(1) (1928) 1 Ch 877

The general principle is that English Courts will not collect the taxes of foreign states for the benefit of the sovereigns of those states

66 (1) If, in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under Chapter VIII, a question of law arises, the Commissioner may, either on his own motion or on reference from any Income-tax authority subordinate to him, draw up a statement of the case and refer it with his own opinion thereon to the High Court

Statement of case by Commissioner to High Court

(2) Within sixty days of the date on which he is served with notice of an order under section 31 or section 32, or of the making of a decision by a Board of Referees under section 33-A the assessee in respect of whom the order or decision was passed may, by application accompanied by a fee of one hundred rupees or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order or decision, and the Commissioner shall, within sixty days of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court

Provided that, if, in exercise of his power of revision under section 33, the Commissioner decides the question, the assessee may withdraw his application, and if he does so, the fee paid shall be refunded.

(3) If, on any application being made under subsection (2), the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may [2][within six months from the date on which he is served with notice of the refusal] apply to the High Court, and the High Court, if it is not satisfied of the correctness

(2) These words were inserted by S 10 of Act XI of 1924

of the Commissioner's decision, may require the Commissioner to state the case and to refer it, and, on receipt of any such requisition, the Commissioner shall state and refer the case accordingly.

(4) If the High Court is not satisfied that the statements in a case referred under this section are sufficient to enable it to determine the question raised thereby, the Court may refer the case back to the Commissioner by whom it was stated, to make such additions thereto or alterations therein as the Court may direct in that behalf

(5) The High Court, upon the hearing of any such case, shall decide the questions of law raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Commissioner by whom the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Commissioner shall dispose of the case accordingly, or, if the case arose on a reference from any Income-tax authority subordinate to him, shall forward a copy of such judgment to such authority who shall dispose of the case conformably to such judgment

(6) Where a reference is made to the High Court on the application of an assessee, the costs shall be in the discretion of the Court

(7) Notwithstanding that a reference has been made under this section to the High Court Income-tax shall be payable in accordance with the assessment made in the case

Provided that if the amount of an assessment is reduced as a result of such reference, the amount overpaid shall be refunded with such interest as the Commissioner may allow

[3][(8) For the purposes of this section "the High Court" means—

(3) This sub section was added by section 7 of Act XXIV of 1926

(a) in relation to the North-West Frontier Province and British Baluchistan, the High Court of Judicature at Lahore,

(b) in relation to the province of Ajmer-Merwara, the High Court of Judicature at Allahabad, and

(c) in relation to the province of Coorg, the High Court of Judicature at Madras]

History—

Under the Act of 1886, the assessee had no right of reference to a High Court He could, of course, invoke the assistance of a Civil Court if the Revenue Officer exceeded his jurisdiction or otherwise acted *ultra vires* of the Act Under the Act of 1918, the assessee had no right, but the authority corresponding to the present Commissioner could at the assessee's instance refer a case to the High Court on any question of interpretation of the Act or the rules made under it, unless the Commissioner thought the reference unnecessary or frivolous

The words "within six months of the date on which he is served with notice of the refusal" were inserted by Act XI of 1924 There was no time limit before

The word "revision" was substituted for "review" by Act XI of 1928

Sub section (8) was added by Act XXIV of 1926 The words "sixty days of the date on which he is served with notice" and "sixty days" in sub section (2) were substituted for "one month of the passing" and "one month" respectively by Act XXII of 1930

The words "or of the making of a decision by a Board of Referees under section 33 A" and the words "or decision" (twice) in sub section (2) were inserted by Act XXI of 1930

Sub section (1) whether mandatory—

Different views were held as to the meaning of section 51 in the 1918 Act which corresponded to the present section 66 In *Chief Commissioner of Income tax v The North Ananta pur Gold Mines*[4] the Madras High Court held that section 106 (2) of the Government of India Act and section 52 of the Income tax Act (corresponding to section 67 of the present Act) prohibited the High Court from entertaining any application under section 45 of the Specific Relief Act in the nature of a mandamus compelling the Chief Commissioner to refer the case, as

(4) 44 Mad 718

such application was a 'proceeding' within section 52 of the Income tax Act and the issue of an order under section 45 of the Specific Relief Act in the nature of a mandamus was an exercise of 'original' jurisdiction The Bombay High Court, however, took a contrary view [5]

In the *Alcock Ashdown case*[6] which went up to the Privy Council the Judicial Committee held (following *Julius* v *Bishop of Oxford*), and that the Chief Commissioner could be compelled to state a case if he abused his discretion or refused to apply his mind to the question in not making a reference

The amendment of the law in 1922 has rendered the above quoted decisions obsolete The assessee has now a right of reference, which does not depend on the Commissioner's discretion, in respect of questions of law arising out of orders under section 31 or 32 If the Commissioner refuses to state a case, the assessee can go to the High Court and make it compel the Commissioner to state a case But, as already observed, such references can be made only with reference to orders passed under section 31 or 32, *i e*, chiefly appellate assessment orders If points of law arise with reference to other matters, *e g*, refunds under section 48 or 49 or orders under section 33, the assessee cannot compel a reference to be made to the High Court The question whether the High Court can interfere under the Specific Relief Act, and order the Commissioner to make a reference under section 66 (1) has been considered in several cases In *Sheik Abdul Kadir Marakkayar's case*,[7] it was argued on behalf of the Commissioner of Income tax that from the fact that the law, as it stands now, explicitly provides remedies by way of reference to the High Court as a matter of right in specified circumstances only, the implication is that the Legislature did not contemplate a reference to the High Court in other cases unless the Commissioner himself found it necessary That is to say, even though sub section (1) is practically the same as section 51 of the 1918 Act, its purport is changed as the result of the insertion of the later sub sections, and a new meaning has to be imposed on it But this contention was rejected, and it was held that the decision of the Privy Council in the *Alcock Ashdown case*[6] should be followed and that the Commissioner must, if there

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(5) See In re *Doraisuamy Iyer & Co* 1 I T C 93 and In re *Bombay and Persia Steam Navigation Co Ltd* 1 I T C 9[illegible]

(6) 1 I T C 221

(7) 2 I T C 155, 49 M 725

is reasonable doubt, refer the case to the High Court, because the wording of sub section (1) of section 66 is practically the same as that of section 51 of the 1918 Act which was in issue in the *Alcock Ashdown case*[8] Therefore, according to this ruling it is clearly incumbent on the Commissioner to make such a reference if a point of law is involved, and under section 45 of the Specific Relief Act the High Court if it so chooses can interfere and compel the Commissioner to state a case To a similar effect are the dicta in *Kumar Sarat Kumar Roy* v *Commissioner of Income tax, Bengal*,[9] and in *Madhavdass Jethabhai's case*[10] On the other hand, in *Ratanchand Khimchand Motishaw* v *Commissioner of Income tax*,[11] the Bombay High Court held that, in the absence of any provision in the Act empowering the High Court to order a reference on points arising out of an order under section 33, they could not ask the Commissioner of Income tax to state such a case See also *Sin Seng Him* v *Commissioner of Income tax*,[12] in which the Rangoon High Court said that, while the Commissioner of Income tax could refer such cases *suo motu*, the High Court could not compel a reference in the absence of express provision in the Act

Though in *Trikamji Jiwan Das* v *Commissioner of Income tax*,[12a] the Patna High Court had directed the Commissioner to state a case under section 66 (1), the Commissioner expressed doubt—when the case was actually referred—whether the Court had powers to act under section 66 (1), but as the case had been referred, the Court dealt with it on its merits, and did not decide the question of jurisdiction In *Jangi Bhagat Rama tatar's case*,[13] the same court doubted its jurisdiction to compel a reference under sub section (1)

In *Shaik Abdul Kadir Marakkayar's case*,[14] the learned Judges of the Madras High Court seem to have been under the impression that somewhere or other there is a provision giving an assessee the right to ask for a case other than under section 66 (2) Under section 51 of the old Act—with reference to which the Privy Council decided *Alcock Ashdown's case*[8]—the Chief Revenue Authority had to refer the case *at the instance of*

(8) 1 I T C 221
(9) 2 I T C 279
(10) 3 I T C 224
(11) 2 I T C 225
(12) 2 I T C 39
(12a) 1 I T C 406
(13) 3 I T C 418
(14) 2 I T C 155

the assessee, and there is no reference to the *assessee* in section 66 (1) now Section 45 (*b*) of the Specific Relief Act is as follows —"that such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character or on such corporation in its corporate character" This is not one of those cases where a statute has enacted something for a particular case only, that was already and more widely the law In such cases it would be useless to argue that an intention to alter the general law is to be inferred from the partial or limited enactment Here section 51 of the old Act which contained the *whole* law on the subject was repealed, and after the decision of the Judicial Committee in *Alcock Ash down case*, the legislature enacts in plain terms what the law is If the assessee had been mentioned in section 66 (1), then it might be said that some law would be in force within the meaning of section 45 (*b*) of the Specific Relief Act But as matters stand even the Specific Relief Act cannot be invoked

Where the legislature has in a special Act laid down particular conditions for the exercise of a power by the Court, it is not justified in disregarding these conditions and holding by reference to a general Act that it has powers beyond those given in the special Act The Rangoon High Court held therefore in *V E A Chettiyar* v *Commissioner of Income tax, Burma*,[15] that it had no power under the Specific Relief Act to interfere with the Commissioner *Heald, J*, also said that the Act is defective and needs amendment An assessee who has neglected to avail himself of his rights under sub section (2), *i e*, to ask for a reference within one month of the passing of an order under section 31 or 32 cannot afterwards claim a reference under sub section (1) (*Subbiah Iyer's case*[16] In the same case it was pointed out that sub section (1) was not for the assessee's benefit but to enable the department to resolve its doubts, *i e* before it reached a decision

Specific Relief Act—Powers under—

The power under section 45 (1) of the Specific Relief Act can be exercised only by the Madras, Bombay and Calcutta, and since 1923, Rangoon High Courts[17] It was argued in *Krishna ballabh Sahay* v *The Governor of Bihar and Orissa*[18] that the

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(15) 3 I T C 436

(16) 58 M L J 581

(17) *Mahomed Farid Mahomed Shafi* v *Commissioner of Income-tax*, 105 I C 167

(18) 5 Pat. 59?

is reasonable doubt, refer the case to the High Court, because the wording of sub section (1) of section 66 is practically the same as that of section 51 of the 1918 Act which was in issue in the *Alcock Ashdown case*[8] Therefore, according to this ruling it is clearly incumbent on the Commissioner to make such a reference if a point of law is involved, and under section 45 of the Specific Relief Act the High Court if it so chooses can interfere and compel the Commissioner to state a case To a similar effect are the dicta in *Kumar Sarat Kumar Roy* v *Commissioner of Income tax, Bengal*,[9] and in *Madhavdass Jethabhai's case*[10] On the other hand, in *Ratanchand Khimchand Motishaw* v *Commissioner of Income tax*,[11] the Bombay High Court held that, in the absence of any provision in the Act empowering the High Court to order a reference on points arising out of an order under section 33, they could not ask the Commissioner of Income tax to state such a case See also *Sin Seng Hin* v. *Commissioner of Income tax*,[12] in which the Rangoon High Court said that, while the Commissioner of Income tax could refer such cases *suo motu*, the High Court could not compel a reference in the absence of express provision in the Act

Though in *Trikamji Jiwan Das* v *Commissioner of Income tax*,[12a] the Patna High Court had directed the Commissioner to state a case under section 66 (1), the Commissioner expressed doubt—when the case was actually referred—whether the Court had powers to act under section 66 (1), but as the case had been referred, the Court dealt with it on its merits, and did not decide the question of jurisdiction In *Jangi Bhagat Ramavatar's case*,[13] the same court doubted its jurisdiction to compel a reference under sub section (1)

In *Sheik Abdul Kadir Marakkayar's case*,[14] the learned Judges of the Madras High Court seem to have been under the impression that somewhere or other there is a provision giving an assessee the right to ask for a case other than under section 66 (2) Under section 51 of the old Act—with reference to which the Privy Council decided *Alcock Ashdown's case*[8]—the Chief Revenue Authority had to refer the case *at the instance of*

(8) 1 I T C 221
(9) 2 I T C 279
(10) 3 I T C 224
(11) 2 I T C 225
(12) 2 I T C 39
(12a) 1 I T C 406
(13) 3 I T C 418
(14) 2 I T C 155

31 and 32 and a case can be demanded to be stated to the High Court

Offences and Penalties—Chapter VIII—No case to High Court—

No case can be stated to the High Court in respect of proceedings under Chapter VIII (Offences and Penalties) These offences have to go before criminal courts who levy the penalties, and the accused have the ordinary remedies under the criminal law

Refunds under sections 48 and 49—

It will be seen that the Commissioner can make a reference *suo motu* only in respect of an assessment or of proceedings in connection therewith "Assessment" has not been defined, and it is unless considered that proceedings under sections 48 and 49 (Refunds) relate to an "assessment" no reference can be made to the High Court in order to resolve any doubt The question has not yet been judicially decided

Service of notice—

Since the amendment of this sub section in 1930, it is necessary for the authority passing the order under section 31 or 32 to give notice of the order to the appellant As regards the procedure for service of notice, *see* section 63

Limitation—

As to computation of the period, *see* section 67 A

High Court—Function of—Not Court of Appeal—

The High Court is not a Court of Appeal to which resort may be had if the assessees happen to be dissatisfied with the decision against them Its functions are strictly confined to the disposal of references on points of law under section 66[22] In *Trustees Corporation* v *Commissioner of Income tax, Bombay*,[23] the Privy Council observed that the stringency of these requirements is clearly deliberate It is the intention of the enactment that the High Court is not to be flooded with such applications The High Court will not entertain any question under this section unless the preliminary statutory conditions have been fully observed

If the Commissioner refers certain questions of law only and refuses to refer others on the ground that there is no question of law involved, the High Court will not except on very strong

(22) In re *Makham Lal Ram Sarup*, 1 I T C 416

(23) A I R 1930 P C 151

grounds adjourn the hearing of the reference in order to hear a petition under section 66 (3) in respect of the questions not referred by the Commissioner[23a]

High Court—Who can move?—

The High Court may be moved under section 66 (3) only if the assessee is competent to apply to the Commissioner under section 66 (2) Accordingly, an assessee who had failed to comply with the assessing officer s demand for accounts under section 22 (4) and had consequently forfeited his right of appeal to the Assistant Commissioner is not competent to move the High Court under section 66 (3)[24]

Also a person cannot move the High Court under section 66 (3) unless he had moved the Commissioner under section 66 (2) and the latter had refused to make a reference[25]

An application for a reference can be made only after the appeal under section 31 or 32 has been disposed of The assessee must exhaust his remedies under the Act before asking for a reference

Section 30 (1) cannot be so construed as to prevent the High Court from examining whether an assessment purporting to be made under section 23 (4) was rights so made *A R A N Chettiyar's case*[26]

An original order passed by the Commissioner under section 28 in the course of proceedings under section 33 is not subject to appeal, and cannot therefore form the subject matter of a reference under sub section (2) of section 66 *Jangi Bhagat Ramavatar's case*[27]

The essential condition for an application under section 66 (3) is that an application under section 66 (2) has been made to the Commissioner and refused by him It has been held therefore in a case in which the assessee moved the Commissioner to exercise his powers under section 33 in the assessee's favour or to refer the case suo motu to the High Court under section 66 (1), and the Commissioner refused to do either, that no application to the High Court would lie under section 66 (3)[28]

(23a) In re *Multanchand Johurmal*

(24) *Benarsi Das v Commissioner of Income tax* 2 I T C 170

(25) *Leong Moh & Co v Commissioner of Income tax* 2 I T C 103

(26) 2 I T C 479

(27) 3 I T C 418

(28) *Panchu Gopal Banerji v Commissioner of Income tax Bihar and Orissa*

Deceased assessee—Return accepted—Whether reference lies—

An assessee whose income *inter alia* was from a profession submitted a return which was accepted by the Income-tax Officer. Five days before the last day on which the tax was due under section 29, the assessee died. The heirs claimed a refund of tax under section 25 (3). *Held,* that no application to the High Court lay under section 66 (3) as there was no refusal on the part of the Commissioner under section 66 (2), the latter arising only out of orders under sections 31 and 32, and the deceased in this case having accepted the assessment; also *obiter* that "assessee" for such purposes includes persons representing a deceased's estate and that if tax is payable by the estate it can also claim a refund [29]

Case stated—Death of assessee before case filed in High Court—

It has been held in the United Kingdom that proceedings are commenced as soon as the written notice requiring the Commissioners to state and sign a case has been given; that such proceedings are not abated by reason of the death of a party before the case is stated; that in order to give effect to the intention of the Legislature the Court has jurisdiction to order the case to proceed by adding the personal representation of the deceased; and that the requirement that a copy of the case should be served upon the other party is sufficiently met by service upon the executor.[29a]

Per *Sankey, J*—"In my view as soon as the notice in writing referred to in that section has been given that is a notice to state and sign a case for the opinion of the High Court—the proceedings have begun I think that the notice is the initiation of proceedings and therefore the proceedings continue in this way The notice having initiated the proceedings, the second step is the duty of the Commissioners to state a case setting forth the facts and their determination and the next step in the proceedings is to transmit the case when so stated and signed *to the High Court* . *The next step in the proceedings normally* —I am not saying there may not be other steps with regard to adjournments but I am not discussing that—is the hearing of the case in the Court—but in my view the proceedings are proceedings which begin with a notice in writing and may end with the decision of the highest tribunal in the land . . . the construction (should be followed) of allowing the matter to proceed by adding a personal representation of the deceased in order to give adequate effect to the intention of the Legislature I am of opinion that I am entitled to do what it seems to me has been done both in the English Divisional and the Irish Appeal Courts namely to so mould a convenient form of procedure to meet the case Mr Latter in

(29) *Govind Saran v Commissioner of Income tax* 105 I C 556

(29a) *Hemming v Williams* (1871) L. R 6 C P 480, *Canning v Farren*, (1907) 2 I R 485 followed

reply to that part said 'Oh, but that cannot be done where the Crown is a party ' I am of course thinking of what would happen when the boot is on the other leg and when it is the subject who wants to appeal I think it would be the height of injustice—and I use the words advisedly—if in any case when the subject wished to appeal—and I am not using in any way offensive words—against an assessment which is considered to be grossly excessive the mere fact of his death should shut out those who would benefit from the appeal from prosecuting it '[30]

A reference before the High Court is not a suit and no question of abatement therefore arises The High Court has to deal with a reference which it has to decide whether or not the assessee or his heirs appear before it Further the heirs are directly interested in the result of a reference since they are entitled to any refund of tax; and even if the proceeding before the High Court had been a suit and the question of parties material, the Court would not decide the question without hearing Counsel for the heirs at least as *amici curiae* The High Court therefore heard the arguments on behalf of the heirs in the *Darbhanga case*[31]

Points of law not raised in first instance—

Even if the application for a reference has been made in time, supplementary questions of law cannot be raised after the time has expired[32]

If the Commissioner holds that there is no point of law, the assessee has to satisfy the High Court that a distinct point of law was raised before the Commissioner and treated by him as a question of fact The High Court will not listen to suggested points of law which were not first taken in the original proceedings and also submitted clearly and definitely on appeal[33]

Similarly, if a number of points be taken before the Commissioner but only one point made in the application to the High Court under section 66 (3), the Commissioner need refer to the High Court that point only and cannot be made to refer other points[34]

Regarding the United Kingdom Act, which says "the High Court shall hear and determine any question or questions of law arising on the case " (section 149, Act of 1918),

(30) *Smith v Williams* 8 Tax Cases 321

(31) 9 Pat 240

(32) In re *Raghunathdas Seolal* (Cal.)

(33) In re *Makham Lal Ram Sarup*, 1 I T C 416, *Tirumengada Mudaliar v Commissioner of Income tax*, 27 L W 729 2 I T C 514 *A K A C T V Chettiyar Firm*, 3 I T C 213 and *Radheylal Balmukund* (All)

(34) In re *Ishardas Dharmachand* 2 I T C 12

Atkin, L J, said in *Attorney General v Aramayo and others*[35] —

"No doubt there may be a point of law in respect of which the facts have not been sufficiently found, and if that point of law was not raised below at all so as to require further facts on either side the Court may very well refuse to give effect to it and either party may have precluded themselves by their conduct from raising in the Court of Appeal the point of law which they deliberately refrained from raising down below But if the point of law or the erroneous nature of the determination of the point of law is apparent on the case as stated, and there are no further facts to be found it appears to me that the Court can give effect to the law "

The High Court is seized only of such questions and such questions only as are raised by the Commissioner of Income tax If, therefore, the Commissioner of Income tax agrees to refer only some of the questions raised by the assessee, the assessee should move the High Court within the time allowed by section 66 (3) in respect of the questions on which the Commissioner does not agree to make a reference The assessee cannot afterwards argue that there can be no such thing as a partial statement of a case, and that he can therefore raise before the High Court, in the course of the reference made by the Commissioner of Income tax, points that the latter has not referred, though the assessee raised them before the Commissioner [36]

In *Shiva Prasad Gupta v Commissioner of Income tax*,[37] the Allahabad High Court observed that the pronoun "it" has been used in section 66, sometimes for "a question of law" and sometimes for the "case" The provision in sub section (4) under which the Court may refer back the case to the Commissioner if the statements are insufficient to enable the Court to determine the question raised *thereby*, *i e*, by the case, makes it clear that it is for the Court to find out what is the real point of law in issue between the assessee and the Income tax authorities There is nothing in the section to suggest that the duties of the High Court are confined to answering the question of law put to it by the Commissioner irrespective of whether it is the real question at issue between the Income tax authorities and the assessee Therefore, though the Commissioner would ordinarily frame the points of law and state his opinions, it is for the High Court to

(35) 9 Tax Cases 445

(36) *Ballakishan and Sons v Commissioner of Income tax* 3 I T C 73 and *P K N P R Chettiyar Firm's case*, 4 I T C 87

(37) 3 I T C 406

determine what questions arise, i.e., to "re-settle the issues" as it were. It is unnecessary to call for a fresh statement of the case under section 66 (4) if the statement submitted by the Commissioner is sufficient to enable the Court to determine the real questions of law in dispute.

In the case of *Kajorimal Kalyanmal*[38] also, the Allahabad High Court raised and decided a question of law not included by the Commissioner in his reference.

In the view of a Full Bench decision of the Madras High Court[39] the above decision in *Shivaprasad Gupta's case* does not mean that the assessee is entitled to argue any question of law which may arise out of the assessment and which he has not asked the Commissioner to refer to the High Court but merely means that the High Court can, if it chooses, alter the questions referred by the Commissioner or reject them altogether and decide the real questions of law at issue between the Commissioner and the assessee at the time when application was made to him to refer the question or questions.

In the case of the *National Mutual Life Association of Australasia*[39a] the Bombay High Court followed the Allahabad ruling in *Shivaprasad Gupta's case* and amended the questions of law and answered them.

The Judicial Commissioners, Nagpur, have, however, held in the case of *Jainaram Motiram*[40] that the assessee is under no duty to formulate questions of law, that it is sufficient if he indicates that the order under section 31 or 32 gives rise to questions of law, and that therefore he can raise questions before the High Court under sub section (3) which were not raised before the Commissioner under sub-section (2).

As regards the unnecessary remission of a case under section 66 (4), the Privy Council observed that "the High Court will be well advised to require, before they seek to entertain any question under the section, always to see that the preliminary statutory requirements of the section are strictly complied with." It would seem from the above that new questions of law should not be raised before the High Court.[41]

(38) 4 I T C 50

(39) *Subbiah Aiyar's case*, 58 M L J 531

(39a) A I R 1929 All. 819

(40) 3 I T C 255

(41) *Trustees Corporation (India), Ltd v Commissioner of Income tax*, A I R 1930 P C 151.

In the case of *Mohanlal Hardeodas*,[42] it has been suggested that if in an order refusing a reference to the High Court the Commissioner of Income tax refers not only to the time bar but also to questions of law, it is open to the High Court to consider the points of law in so far as the High Court is otherwise competent under the Income tax Act to consider them, *e g*, if the Income tax Officer did not in truth assess under section 23 (4), and if the High Court hold that the application was really not time barred

Order to state case—Cannot be subsequently challenged—

If the High Court has directed the Commissioner to state a case, it is not open to another Bench to question the validity of the order [43] But this does not affect the right of appeal, if any, of the assessee in cases of refusal by a single Judge to order the Commissioner of Income tax to state a case see *Toharlal Uttam chand* and other cases set out *infra*

The competency of a Court to issue a mandamus should be questioned before the mandamus is issued, and not when the reference is actually heard [44]

High Court—When functus officio—

In *Ramgopal Moolchand v Commissioner of Income tax*[45] it was held that the Court having once exercised its discretion and fixed the costs was *functus officio* and could not re open the matter Questions relating to costs should therefore be discussed *before* orders are passed under section 66 (6)

Application for reference—Delay in—Commissioner cannot condone—

The Commissioner has no power to condone delay if the assessee does not present his application for a reference within the time allowed Any reference made by the Commissioner after such condonation is not valid inasmuch as he has no jurisdiction to do so See *Banjilal v R* [46] and *Murlidhar v Secretary of State* (previously unreported and referred to above) It follows that, if an application is made too late, the Commissioner is not bound, in refusing to make a reference, to state in express terms the reasons for his not making a reference See *Hukmi-*

(42) 9 Pat 192

(43) *Trikamjee Jiwandas v Commissioner of Income tax* 1 I T C 406

(44) *Gokal Chand Jagan Nath v Commissioner of Income tax* 2 I T C 180, *Dinanath Hemraj v Commissioner of Income tax*, 2 I T C 306 (All.)

(45) 1 I T C 416

(46) 6 Lah 373

chand Hardatroy v *Commissioner of Income tax*[47] and *Ratan chand* v *Commissioner of Income tax* [48]

"The statute fixes a time and it is an obviously undesirable burden to cast on the Income tax Commissioner to put upon him the considera tion of questions as to whether he should exercise discretion in the direc tion of leniency in one case and not another The statute is express and there is no provision in the statute for any official, or even for the Court, to extend the time "[48a]

Supplementary questions of law cannot be raised by the assessee after the last date for the application for a reference has expired In re *Raghunathdas Sheolal* As to how limitation should be computed, *see* section 67 A

In *Edwards* v *Roberts*,[48b] a case under the Summary Juris diction Act, 1857,[48c] in which the notice and copy of the case were not given within the prescribed time, it was held that the High Court had no jurisdiction to hear the reference In *Aspinall* v *Sutton* [48d] another case under the same Act, it was held that the case must be lodged at the proper office within the prescribed time See also *Dickenson & Co* v *Mayes*,[49] *Holland* v *Peacock* [50] and *Godman* v *Crofton* [1]

Fee—Payment of condition precedent to reference—

If the fee is not sent in, the application is not valid, and the Commissioner need not take any action In England, the fee is only 20 shillings

Fee—Separate for each assessee—

It is not competent for separately assessed persons to combine their applications for a case stated in one document If they are separately assessed, the case must be stated separately, and a fee of Rs 100 paid for each case [2]

(47) 2 I T C 140

(48) 9 Lah 188

(48a) Per Coutts Trotter, C J, in *Motlay Ganga Rasu and others* v *Commis sioner of Income tax* 2 I T C 199, see also *Sarat Kumar Roy* v *Commissioner of Income tax* 2 I T C 279

(48b) (1891) 1 Q B 302

(48c) 20 and 21 Vict, c 43

(48d) (1894) 2 Q B 349

(49) (1910) 1 K B 452

(50) (1912) 1 K B 154

(1) (1914) 3 K B 803

(2) *Mothay Ganga Ra u and others* v *Commissioners of Income tax*, 2 I T C 199

Fee—Whether for each point or for each reference—

The fee of Rs 100 (or lesser sum prescribed) is on account of each reference and not on account of each point of law in a reference[3]

"Any question of law" means "any questions of law"—*see* General Clauses Act (X of 1897)

Delegation—By Commissioner—

The Commissioner may not delegate the power under this section to any subordinate officer Nor may he refuse to pass an order The jurisdiction of the High Court under section 66 (3) arises on a refusal to state the case under section 66 (2)—whatever the cause of such refusal[4]

Decision of High Court—Re-opening of similar cases—

When an assessee wins his case under section 66, he is of course entitled to be repaid the tax (together with such interest as the Commissioner may allow) But that will not enable other assessees in whose cases the same point of law was involved to establish a legal claim to repayment of the tax unless the time allowed has not elapsed since the orders of the Assistant Commissioner or Commissioner were passed under section 31 or 32 and the assessee makes an application under section 66 accompanied by the usual fee There is nothing, however, to prevent the Commissioner re opening such cases *suo motu* under section 33 and granting refunds *ex gratia* in those cases in which he thinks that the strict operation of the law would entail hardship

Success in points of law not necessarily favourable to assessee—

Even if the Commissioner of Income tax agrees with the assessee on the points of law and therefore finds it unnecessary to refer the case to the High Court, it does not follow that the assessee wins his case It may be that in exercising his powers of revision under section 33 the Commissioner of Income tax may be compelled to revise the findings of fact also, so that the point of law does not help the assessee

Orders under section 32—

Under section 33 the Commissioner has no power to revise orders passed by him under section 32 It follows, therefore, that the proviso in sub section (2) gives power to the Commissioner to consider in revision only orders under section 31

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(3) *A R A R S M Chockalingam Chetty v Commissioner of Income tax*, I I T C 392, 2 Rang 579

(4) *Gokulchand Jagannath v Collector of Income tax, Sialkot*, 1 I T C. 260

Revision by Commissioner on application for reference—Not binding on assessee—

The assessee is not bound to withdraw the application merely because the Commissioner revises the assessment The proviso under sub section (2) is merely intended to give an opportunity to the assessee of withdrawing the application for reference and getting back the fee

There is no right of reference against an order under section 33 (even if such order be prejudicial to the assessee),[5] but if the Commissioner of Income tax passes orders under section 33 in connection with an appeal (application for reference?) under section 66 (2), the assessee is not deprived of his right of reference under section 66 (3) [6]

See, however, notes as to the applicability of the Specific Relief Act

Having unsuccessfully moved the High Court to order a reference, under section 66 (1), of points arising out of an order of the Commissioner of Income tax under section 33, an assessee sought a reference to the High Court under section 66 (2) on the ground that the Income tax Officer, in communicating the demand as revised by the Commissioner of Income tax under section 33, had (wrongly) issued a notice under section 29 and described the demand as one relating to an assessment under sections 23 and 33 The Commissioner agreed that the reference to section 29 was wrong and that section 45 should have been referred to, but refused to make a reference on the other points raised by the assessee which had nothing to do with this mistake of the Income tax Officer The Lahore High Court declined to order a reference under section 66 (3).[7]

Section 37 not applicable to proceedings under section 66—

Section 37 does not apply to the proceedings of the Commissioner in connection with references under section 66, but if, as the result of an application for reference, the Commissioner revises or seeks to revise the proceedings under section 33, then the provisions of section 37 will apply in respect of proceedings relating to the revision

Procedure—Form of case—Points raised—

The Act does not lay down any procedure It is for the Commissioner to refer the case in such form as he may decide

(5) *Sin Seng Hin v Commissioner of Income tax*, 2 I T C 39

(6) *Per* Cunliffe, J, in *Ramanatha Reddi v Commissioner of Income tax*, 6 Rang 175

(7) *Mohammed Farid Mohammed Shafi v Commissioner of Income tax*, 105 I C 167

with his opinion on the questions of law In practice, however, the form of the case stated is agreed upon in most provinces between the assessee and the Commissioner before it is referred to the High Court, and some High Courts have made rules on the subject As observed by Sankey, J, in *Smith* v *Williams*[8] it is open to the High Court to mould the procedure when the Act makes no provision As to the way in which a case is to be presented, the following dicta of Judges may be noted

a statement of a case under section 66 ought to be drawn up in such a form as to state with precision and in a condensed form (the usual and most convenient practice is to do so in numbered paragraphs) all the facts and proceedings in chronological order which have led to the question of law arising The statement of facts ought to be framed in such a form as whilst stating completely and impartially every relevant fact to show what is the question of law to which such statement of facts has given birth To use a colloquial illustration the statement of facts is the matrix the question of law is the product and the statement should conclude by framing in the most clear and concise language the exact question of law and the section under which it arises [9]

The case stated is in fact an argumentative expression of his opinion as to the law to be applied in the course of which certain facts incidentally appear We desire to take this opportunity of stating for the guidance of the Income tax Commissioner in future that whilst it is quite proper for him to state his opinion upon the questions involved it is his first duty to state clearly and fully the material facts admitted or proved in evidence before him To adopt any other course must in most cases result in embarrassment and uncertainty when the matter comes before the Court for its decision the Court being bound by the findings of fact arrived at ' [10]

It is respectfully submitted that it is not only *proper* but *incumbent* on the Commissioner under the section, to state his opinion on the points of law The words in the section are "The Commissioner *shall* refer it with his own opinion"

"It is the duty of the Commissioner to find all the relevant facts he is not merely required to state the questions of law and give his opinion he is required above all things to state the facts upon which the questions of law must be decided *per* Rankin C J in *Ananda Mohan Saha s case* [11]

A question of law should be so framed as to enable the Court hearing the reference to decide on the facts what is the answer to the question It should not be so framed as to assume hypotheses compelling

(8) 8 Tax Cases 321

(9) *Per* Walsh C J in In re *Lachhmandas Narandas* 1 I T C 378

(10) *Per* Dawson Miller, C J in *Raja Shivaprasad* v *Crown* 1 I T C 384

(11) 3 I T C 1

an answer in one way only when the hypotheses themselves have to be tested The above dictum was given by a Bench of the Madras High Court [*Chengalvaraya Chetti's case*[11a] with reference to a question of law framed by the Judge who ordered a reference under sub section (3)]

Per *Lord Sumner* in *Lysaght* v *Commissioners of Inland Revenue*[12] It is certainly much to be wished that the Commissioners should be scrupulously careful to say that they 'find' a conclusion of fact, arrived at from other facts found or if they only mean to apply the law as they understand it to be and not to draw any conclusion of fact, should say that they hold so and so in accordance with what they conceive to be the law for a debate on the meaning of a case stated is an unsatisfactory preclude to a debate on the general law applicable "

" the Commissioners have in this case adopted a mode of framing the case they have stated which is, I think both objectionable and embarrassing Their determinations of questions of pure fact are not to be disturbed, any more than are the findings of a jury, unless it should appear that there was no evidence before them upon which they as reasonable men, could come to the conclusion to which they have come and this even though the Court of Review would on the evidence have come to a conclusion entirely different from theirs With their rulings upon questions of law it is entirely different The Court of Review is quite entitled, indeed I think, bound, to overrule their decisions if they think them erroneous What I have many times in this House protested against is the attempt to secure for a finding on a mixed question of law and fact the unassailability which belongs only to a finding on questions of pure fact This is sought to be effected by styling the finding on a mixed question of law and fact a finding of fact What is the proper construction of a statute, or of any other printed or written document is a question of law .

It is essential, therefore, that the Commissioners should, when stating a case clearly set forth the conclusions of law at which they have arrived and separate and distinct from these the conclusions of fact at which they arrived That is the proper and convenient course to follow Any other only leads to embarrassment .[13]

"A case should not be so stated that one of the parties is ruled out by an averment that the Commissioners found as a fact something that is being raised as a point of law "[14]

"I only wish to add that . the Commissioners ought not to state either side out of Court by stating under the guise of fact that which is really law " "But this does not mean that the Commissioners ought only to state the circumstances and leave the Court to draw its own conclusions of fact as well as law The Commissioners

(11a) 2 I T C 14

(12) (1928) A C 234, 13 Tax Cases 511

(13) Per Lord Atkinson in *Great Western Ry Co* v *Bater*, 8 Tax Cases 244

(14) Per Farwell, L J, in *New Zealand Shipping Co* v *Stephens*, 5 Tax Cases 553

are bound to find the facts In finding the facts they are bound to act upon legal principles and upon evidence which in law can support their finding, and they should state their findings of fact, but if they are requested to do so and if it be possible—sometimes it might not be—then I think they should, upon the face of the case, state the circumstances upon which they have come to that conclusion, in order that the Court may judge whether in law those circumstances afford any evidence for the conclusion of fact to which the Commissioners have come "[15]

Amendment—Case stated—

The practice in the United Kingdom is to permit the amendment of the case if both parties agree But the Court of Appeal and the House of Lords will not permit any points to be raised which are not raised in the High Court in the first instance[16] In the same way, it is presumed in regard to cases in India that the Privy Council will not take notice of a point not raised before the High Court

Remission—

See the remarks of the Privy Council in the case of the *Trustees Corporation*[16a] deprecating the unnecessary remission of cases under sub section (4)

Hearing—Right to begin—Reply of Crown—

Counsel for the appellant has the right to begin, and also the right of reply after the Crown Counsel has answered[17]

There would seem to be nothing to prevent a High Court from hearing more than one Counsel on each side under section 66 if it chooses to

Costs—

There is no express provision in the law either in the United Kingdom or here to enable an assessee to recover the costs incurred *before* the reference, *i e*, in preparing a case for approval and presentation to the Court by the Commissioners The Scottish Courts disallow such costs—see *Scottish Union and National Insurance Co v Commissioners of Inland Revenue*,[18] but the English Courts allow such costs, the idea being that

(15) *Per* Sterndale, M. R in *New Zealand Shipping Co v Thew* 8 Tax Cases 221

(16) See *City of London Contract Corporation v Styles* 2 Tax Cases 239, *Apthorpe v Peter Schoenhofen Brewing Co* 4 Tax Cases 55

(16a) A I R 1931 P C 151

(17) *Commissioner of Income tax v Ramanathan Chetti* 1 I T C 37 43 Mad 75, *Killing Valley Tea Coy v Secretary of State* 1 I T C 54 In re *John & Co*, 1 I T C 61

(18) 26 Sc L. R 489

such costs save costs on account of the hearing and therefore really amount to less in the end[19] In India, such costs are not allowed

As regards the costs on the reference, the law in the United Kingdom is the same as here, the general English principle that the Crown neither receives nor pays costs having been suspended by specific enactment, *viz*, section 149 (2) (*a*), Income tax Act, 1918[20] The practice is as below The successful party ordinarily gets the costs, and if the Crown is appellant and succeeds, it is allowed costs even though the respondent does not appear On the other hand in *Knight* v *Manley*,[21] in which the Crown as respondent abandoned the claim to assess certain stables but succeeded on the main point, the appellant was allowed his costs even though he had lost on the main point Counsel s fees are allowed to the Crown even though Counsel draws a fixed salary[22]

Recently however, in connection with *Whelan* v *Henning* which went up to the House of Lords, the whole question of costs in income tax cases is being re examined by the Government in the United Kingdom

The rule in the House of Lords that no costs are allowed if there is an equal division of opinion—see *Smith* v *Lion Brewery*[23] and *Egyptian Hotels* v *Mitchell*[24] is of no help in India, where a similar situation cannot arise

The practice in India is not uniform Broadly speaking, costs follow the event—and there is no reason why income tax cases should form an exception to the rule—and the successful party should recover from the other party the costs necessary to enable him to place the case before the Court *see* In re *Jagannath Vasudeo Pandit*[25] Where the success is partial the Court will use its discretion In *Killing Valley Tea Co* v *Secretary of State*[26] and *Birendra Kishore Manikya* v *Secretary of State*,[27] each party was made to bear its own costs as both parties advanced claims much beyond their rights Varying amounts have

(19) See *Manchester Corporation* v *Sugden* *Gresham Life Assurance Society* v *Bishop* C A (1903) 2 K B 171 4 Tax Cases 595

(20) 8 and 9 Geo V c. 40 *Revell* v *Directors of Elsworthy Bros* 3 Tax Cases 12 *Bowers* v *Harding* 3 Tax Cases 22 and *Smyth* v *Stretton* 5 Tax Cases 36

(21) 5 Tax Cases 82

(22) *Lord Advocate* v *Stewart* (1899) 36 Sc L R 945

(23) 5 Tax Cases 568

(24) 6 Tax Cases 542

(25) 45 Bom 1177 and cases cited therein

(26) 1 I T C 54

(27) 1 I T C 67

been given by High Courts as costs, e g , In re *Aurangabad Mills*[28] costs were taxed as on the Original Side On the other hand, Madras and Allahabad have allowed lump sums as costs Sometimes, Courts take into account the fee of Rs 100 deposited under section 66 (2) in awarding the costs As the discretion is given to the Court, it cannot be delegated to the Taxing Officer or other officer of the Court[29] It is only the discretion that cannot be delegated, and there is nothing to prevent the Court awarding costs on the usual scale allowed in the Court, subject to check by the Taxing Officer in the ordinary course Where references are withdrawn at the instance of either party, costs are usually allowed to the other party

Costs—Resident agents of non residents—

In *Wilcock v Pinto & Co*,[30] set out under section 4 (1), the point was raised whether an order for costs could be made against the resident agent It was contended on behalf of the agent that the payment of the duty in question could not be enforced against the agent, and, therefore, no order for costs could be made against him The Court of Appeal held that the possibility of enforcing the duty against the agent was not in issue before them, and that so far as they were concerned, the appellant on the case stated by the Commissioners was the resident agent and that the Court were only concerned with the appellant as so stated, namely, the resident agent

Privy Council—Costs—

See section 66 A and notes thereunder

Interest—

In the United Kingdom, the interest paid to the assessee on the tax refunded is fixed by the High Court, here, it is fixed by the Commissioner As in all such powers of discretion, the Commissioner has a wide latitude in the matter, and unless he acts flagrantly against "equity and good conscience" no Court can interfere with his discretion Precedents as to the rates of interest allowed, whether English cases or Indian, are of no help The rate must obviously depend on the market rate of interest from time to time

Jurisdiction—Original or appellate—

In *Birendra Kishore Manikya v Secretary of State*[31] the Calcutta High Court held that, though when hearing a reference

(28) 1 I T C 119

(29) See *Lambton v Parkinson*, (1886) 35 W R 545

(30) 10 T C 415

(31) 1 I T C 54

it really performed the functions of a Court of Appeal, the test for the purpose of right of audience of Counsel, Attorneys, etc, should be the residence of the assessee or his place of business Therefore, if such residence or place was outside the limits of *original jurisdiction of the Court, only Vakils and not Attorneys,* could appear In *Raja Probhat Chandra Barua's case*[32] the same Court suggested that income tax cases came neither under the original nor the appellate jurisdiction of the High Court, but under a special jurisdiction The Court has since made rules under which all references under the Income tax Act are dealt with by a Special Bench, before whom Vakils and Attorneys can appear

The Madras High Court held in *Chief Commissioner of Income tax* v *North Anantapur Gold Mines*[33] that the Court exercises original jurisdiction in deciding income-tax references, but this view was not accepted by the Privy Council—see *Alcock Ashdown case*[34] *Income tax references in the* Madras High Court are now decided by a Special Full Bench appointed for the purpose

In In re *Aurangabad Mills, Ltd*,[35] the Bombay High Court held that, in view of the fact that the reference is made by an officer within the local limits of the original jurisdiction of the Court, costs should be given on the Original Side scale

Decision of High Court—How far binding—

A decision of the High Court on a reference under section 66 *does* not bind the Commissioner of Income tax *or the* assessee except on the particular case with reference to which the decision was given, and there is nothing, in theory, to prevent either the Commissioner or the assessee referring the question again for decision—on another case, of course The Commissioner *is not* a Court subordinate to the High Court

As to what would happen if the Commissioner did not "*dispose of the case conformably to the* judgment" of the High Court see the following remarks of Lord Reading, C J, in *Rex* v *Speyer*[36]

' This is the King s Court, we sit here to administer justice and to interpret the law of the realm in the King's name *It is respectful* and

(32) 1 I T C 414
(33) 1 I T C 133
(34) 1 I T C 221
(35) 1 I T C 119
(36) (1916) 1 K B 595

proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown"

Assessee—Whether member of Hindu undivided family—

The question whether an assessee is a member of a joint family sharing in the funds, or whether he is separate, is a pure question of fact which must be tried according to law like every other question of fact[37] But the legal effect of the disruption of a Hindu undivided family and its business is a question of law[38]

Whether a particular document, on which the status of a family depends, is genuine or fabricated is a question of fact[39]

Authorities in different provinces differing on facts—

The Income tax authorities in one province are not bound by the findings of fact of the authorities in another, and if they differ, no question of law arises merely because of the difference[40]

Delay in appeals—Section 30 (2)—Not condoned by Assistant Commissioner—

No question of law arises in connection with non condonation of delay in presenting the appeal, and therefore no reference lies to the High Court[41]

Facts of preceding years—

In regard to questions like residence, though the question of each year's liability is a separate issue, the facts over a period of years may be taken into account in order to get a clear picture as to the position in the year in question See per *Lord Sumner* in *Levene* v *Commissioners of Inland Revenue*[42]

High Court bound by findings of fact—

It is not open to the High Court to consider the facts and then order the Commissioner to alter his findings of fact and then refer the questions of law that arise That is to say, the Commissioner's findings of fact must be accepted, and only such questions of law considered as arise from the findings of fact The fact that some other findings of fact might give rise to other questions of law gives no jurisdiction to the High Court to consider such questions of law[43]

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(37) In re *Makhan Lal Ram Sarup* 1 I T C 416

(38) *Nathumal* v *Commissioner of Income tax* 103 Ind Cas 522

(39) *Chokeylal Murlidhar* v *Commissioner of Income tax* (All) 4 I T C 7

(40) *L P M S T Chettiyar* v *Commissioner of Income tax Burma* 3 I T C 416

(41) *Kasi Chettiyar* v *Commissioner of Income tax* 2 I T C 98

(42) (1928) A C 217, 13 Tax Cases 486

(43) *Commissioner of Income tax* v *Ar Ar S M Somasundaram Chettiar*, 2 I T. C 6

Findings of fact will ordinarily be presumed to be complete, and the case will not be remitted back to the Commissioner for further findings unless there are obvious lacunæ [44]

"Mr Scrutton in his very excellent argument suggested that the facts were all wrong Well, they may be all wrong I cannot help it The only thing sent to us is these facts, and it is points of law upon these facts that we have to decide " [45]

" It is not a question of what was before the Commissioners, but what the facts were You cannot escape paying income tax because some one raised a wrong question before the Commissioners " [46]

If there had been a misunderstanding the Court may strain a point to put it right, and if the Commissioner fails to include or to allude sufficiently to some topic that was brought before him by evidence, the Court may agree to put that right but it will not remit a case for findings on additional facts in respect of which the assessee led no evidence before the Revenue officers [4]

Where a Commissioner was asked to state a case regarding the admissibility of certain deductions from the taxable income, and he determined on the evidence before him whether the various items in dispute ought to be allowed as deductions or not, it was held that the Commissioner's decision was one of fact on the evidence before him and that there was no question of law for the High Court to consider [47a]

Fact and law—

As to the difference between 'fact' and 'law', and the extent to which the High Court is bound by the findings of the Commissioner, the following dicta may be referred to

"But to draw an inference of fact from evidence before you is not a question of law at all The inference is a question of fact just as much as the direct evidence of fact " [48]

If the Commissioners have misconstrued a section of an Act, or have not done or applied their minds to doing that which the section directed, or if it is clearly shown that they have in

(44) *T S Firm v Commissioner of Income tax*, 50 Mad 847

(45) Per *A L Smith, L J*, in *Apthorpe v Peter Schoenhofen Brewing Co* 4 Tax Cases 212, see also *Sungei Rinching Rubber Co v Commissioners of Inland Revenue*, 133 L T 670

(46) Per *Lord Esher, M R*, in *Blake v Imperial Brazilian Ry*, 2 Tax Cases 60

(47) *Bird & Co v Commissioners of Inland Revenue*, 12 Tax Cases 785, 19 S C 188

(47a) *Dr R N Singla v Commissioner of Income tax, Burma*

(48) Per *Lord Esher* in *R v Special Commissioners of Income tax (In re G Fletcher)*, 3 Tax Cases 289

cluded, in coming to their result, some element—where the result is one of money and value—which they ought not to have included, or *vice versa*, an appeal to the High Court will lie [49]

The facts of a case are not before the Court in the matter of proof, but they are before it in the matter of findings [50]

The proper inferences to be drawn from admitted facts may involve legal considerations [1]

"Though stated as a point of law the Court may declare it to be one of fact [2]

Whether on the facts stated, the case falls under a particular section or not is obviously a question of law

If the Commissioners find something as a fact the Court is entitled to look and see whether there were materials on which they could properly find it [3]

If the Commissioners find a fact, the High Court cannot question it unless there is no evidence to support it If, however, the Commissioners state the evidence which was before them, and add that upon such evidence they hold that certain results follow, it is open to the Court to say whether the evidence justified what the Commissioners held [4]

"It is as a rule a point of law whether there is evidence on which a certain finding of fact can be made If the true question of law is whether, on the evidence it was possible for the Commissioners to come to a certain conclusion of fact, the assessee may request the Court to send the case back in order that the facts proved before the Commissioners may be set out to enable the assessee to raise the point of law whether it was possible on such facts or such evidence to come to the conclusion of fact But this objection to a case must be taken *in limine* [5]

"That would be a question of law a question of evidence or no evidence, but if there is any evidence at all then it is for the Commissioners and not for the Court [6]

"I only say with regard to the finding of the Commissioners that it seems to be based entirely upon a misapprehension and therefore I

(49) *P and O Steam Navigation Co* v *Leslie* 4 Tax Cases 177

(50) *Macpherson & Co* v *Moore* 6 Tax Cases 113

(1) *Scottish Provident Institution* v *Allen* 4 Tax Cases 416 592

(2) Per Avory J in *Metropolitan Water Board* v *Kingston Union Assessment Committee* (1925) 2 K B 5[illegible]9

(3) *English Crown Spelter Co* v *Baker* 5 Tax Cases 33[illegible] *American Thread Co* v *Joyce* 6 Tax Cases 163

(4) *Bonner* v *Basset Mines* 6 Tax Cases 146 *American Thread Co* v *Joyce*, 6 Tax Cases 163

(5) *Fletcher Moulton L J* in *New Zealand Shipping Co* v *Stephens* 5 Tax Cases 566

(6) Per *Farwell L J* in *New Zealand Shipping Co* v *Stephens*, 5 Tax Cases 566

cannot look upon their finding as a distinct finding upon a question of fact, upon which there is no appeal I think I have all the facts before me and can determine what is the proper conclusion of law to be drawn from them "[7]

It is undoubtedly true that, if the Commissioners find a fact, it is *not open to this Court to question that finding unless there is no evidence* to support it If, however, the Commissioners state the evidence which was before them and add that, upon such evidence, they hold that certain results followed I think it is open, and was intended by the Commissioners that it should be open to the Court to say whether the evidence justified what the Commissioners held They have carefully stated the evidence, but they have not, in my opinion, to use the words found in one of the authorities, 'stated the appellants out of court' [8]

Now *the question where an artificial person like a Corporation* resides is clearly not a pure question of fact It would not be so even in the case of an individual It is a pure question of fact whether an individual was in a house on a particular day or on a particular series of days but you cannot say whether those acts or presence are sufficient to make him a resident in that house until you know what in the eye of the law is sufficient and is necessary to constitute residence If that is true of an individual it must be still more evidently true in the case of a Corporation in which the word 'residence' cannot in any very natural sense be applied The question of pure fact must be decided in the same way whatever be the system of law in force, and whatever be the purpose for which it is necessary to decide it, but when you come to a question of residence it is easily conceivable that under different systems of law, there might be different requisites to constitute residence, and even under the same system of law residence for one purpose might be proved under certain circumstances which would not constitute residence for another purpose We therefore have here to see what are the findings of pure *fact and then we have to apply to those* the proper legal principles in order to see whether the true deduction from those facts is that this Company resided in the realm

Now, in finding questions of pure fact, the tribunal is a tribunal without appeal It is perfectly true that if it finds facts where there is no evidence that becomes a matter of law, and we can set aside the finding but I cannot doubt that there was evidence *to support* the findings and therefore they must be accepted by us legally and without criticism "[9]

It is not for us to enter into the question how, on the materials which came before the Inland Revenue Commissioners, we should have dealt with the question of fact The Taxes Management Act of 1880 precludes us from looking at the finding of the Commissioners except in

(7) Per *Bray, J*, in *Merchiston Steamship Co* v *Turner*, 5 Taxes Cases 5.8

(8) Per *Cozens Hardy, M R*, in *Gramophone and Typewriter, Ltd.* v *Stanley*, 5 Tax Cases 358

(9) Per *Fletcher Moulton, L J*, in *The American Thread Co* v *Joyce*, 6 Tax Cases 30

so far as it is necessary to see whether there was any evidence which could have supported it "[10]

"The facts set out by the Commissioners are found by them under circumstances when we have no authority to review the finding if it was wrong It is enough to say that they have found it, and that there was evidence upon which they might find it, and if they did find it, and if there was evidence upon which they might find it, there is no question of appeal here at all "[11]

". . . The first question that has been debated before us is this Is the question whether a man is carrying on a profession or not a matter of law or a matter of fact? I do not know that it is possible to give a positive answer to that question, it must depend upon the circumstances with which the Court is dealing There may be circumstances in which nobody could arrive at any other conclusion than that what the man was doing was carrying on a profession, and therefore, looking at the matter from the point of view of a judge directing a jury, the judge would be bound to direct them that on the facts they could only find that he was carrying on a profession That reduces it to a question of law On the other hand, there may be facts on which the direction would have to be given the other way But between those two extremes there is a very large tract of country in which the matter becomes a question of degree, and where that is the case the question is undoubtedly, in my opinion, one of fact, and if the Commissioners come to a conclusion of fact without having applied any wrong principle then their decision is final upon the matter '[12]

" If the questions arising in the case are questions of fact the determination of the Commissioners is final provided that there was evidence on which they could come to the conclusion they did, and that the Court itself, or any member of the Court might on the facts have come to a different conclusion is perfectly irrelevant provided that there was evidence from which the Commissioners' conclusion could be reasonably drawn I do not say that all the authorities on the subject have been consistent I rather agree with what Lord Parker said in *Farmer v Cotton's Trustee*[13] 'It may not always be easy to distinguish between questions of fact and questions of law for the purpose of the Taxes Management Act, 1880 or similar provisions in other Acts of Parliament The views from time to time expressed in this House have been far from unanimous' I think the reason is as has been suggested by the Master of the Rolls, that there has been a very strong tendency, arising from the infirmities of human nature in a judge to say if he agrees with the decision of the Commissioners, that the question is one of fact, and if he disagrees with them that it is one of law, in order that he may express his own opinion the opposite way Undoubtedly the less a judge has tried

(10) *Per the Lord Chancellor, ibid*, page 163

(11) *Per the Earl of Halsbury*, 6 Tax Cases 164

(12) *Per Lord Sterndale M R*, in *Currie v Inland Revenue Commissioners*, K B D, 1921 (2) 335 336

(13) (1915) A C 922, 932

cases with juries the greater is the tendency on his part to think that the view he forms on the evidence is the only possible one, but when he has tried innumerable cases with juries and continually finds twelve reasonable and intelligent men taking a different view of the evidence from that which he himself takes he becomes more and more convinced that there may be in many states of facts more than one possible view of the evidence and that the fact that he would have taken a different view himself does not show that the view taken by the twelve persons was necessarily wrong,

They are the judges of fact, and whether a man carried on a profession is in the last resort a question of fact The reason why it appears to me to be so is this In my view it is impossible to lay down any strict legal definition of what is a profession because persons carry on such infinite varieties of trades and businesses that it is a question of degree in nearly every case whether the form of business that a particular person carries on is or is not a profession Accountancy is of every degree of skill or simplicity I should certainly not assent to the proposition that as a matter of law every accountant carries on a profession or that every accountant does not The fact that a person may have some knowledge of law does not, in my view, determine whether or not the particular business carried on by him is a profession Take the case that I put during the argument of a forwarding agent From the nature of his business he has to know something about Railway Acts about the classes of risk that are run in sending goods in a particular way and under particular forms of contract That may or may not be sufficient to make his business a profession Other persons may require rather more knowledge of law and it must be a question of degree in each case Take the case before Rowlatt, J of a photographer *Cecil v Inland Revenue Commissioners*[14] Art is a matter of degree and to determine whether an artist is a professional man again depends in my view on the degree of artistic work that he is doing All these cases which involve questions of degree seem to me to be eminently questions of fact which the Legislature has thought fit to entrust to the Commissioners who have at any rate from their very varied experience, at least as much knowledge if not considerably more of the various modes of carrying on trade than any judge on the bench

" I very much doubt whether it would be possible for me even if I held a different view to decide otherwise After all the Commissioners are judges of fact and they have not disclosed to me what view of the law they took. I cannot possibly say there is no evidence in support of that finding But as the Commissioners have not disclosed to me upon what view of the law they proceeded I very much doubt whether they have stated a case upon any point which is open to me and indeed if I were invited to define exhaustively as a matter of law what a profession was I should find the utmost difficulty in doing so At the same time I am not at all clear that the fact that there may be two inconsistent findings of fact by the tribunal

(14) 36 Times L R 164

which is bound to decide facts would in itself justify this Court in interfering That may be the mistake of the Legislature in entrusting the decision to such a body as the Commissioners or it may be due to the infirmity of human nature in sometimes making mistakes [15] "

"It is for a court of law to construe these several paragraphs as written documents just as the courts of law often have to construe the answers (in writing) of Juries to questions put to them by the Judge presiding at a trial or as such courts have to construe a correspondence between parties litigant to determine whether their letters in the aggregate contain a concluded contract in writing In doing this the tribunal of law does not usurp the exclusive jurisdiction of the tribunal of fact, and from facts found by the latter draw a further inference of fact It merely discharges its proper and exclusive function of construing written documents " [16]

"This involves the construction of the language of the case stated It must be interpreted in the light of common knowledge and by the common sense of the language used, but the findings of fact, as such, when ascertained are final In the judgment appealed from it is said 'I can see no such finding of fact in the case ' This is so in terms but in substance it is otherwise Furthermore the judgment seems to say that the question whether a given disbursement is 'wholly or exclusively laid out for the purposes of the trade or concern is a question of law and not of fact With this I am not able to agree Though the answer to the question may itself be an inference from a wide area of facts, it is an answer of fact There is no suggestion here that the Commissioners found the facts under any mistake in law including in that term the view, conscious or unconscious, that a fact may be found when there is no relevant evidence to support "[17]

"These findings (of fact) of the Commissioners must be accepted and the courts are precluded from questioning them except so far as it is necessary to see whether there is relevant evidence "[18]

"Your Lordships were pressed with the usual argument, that as the county court judge though a judge of law and facts is the sole judge of fact, his findings cannot be disturbed if there be any evidence before him upon which he, as a reasonable man could find as he has found That argument is quite sound if it be applied to pure findings of fact. It is utterly unsound if it be applied either to findings on pure questions of law or on mixed questions of law and fact The rule is analogous to that followed in setting aside the verdicts of juries There is however, this vital difference between the two cases Juries can only decide questions of fact The arbitrators in these cases can decide questions both

(15) Per *Scrutton L J* in *Currie v Inland Revenue Commissioners* (1921) 2 K B 338, 12 Tax Cases 245

(16) Per *Lord Atkinson* in *Usher's Wiltshire Brewery Limited v Bruce*, 6 Tax Cases 399

(17) Per *Lord Sumner* in *Usher's Wiltshire Brewery Limited v Bruce*, 6 Tax Cases 399

(18) Per *Lord Parmoor*, *ibid*

of law and of fact There is no danger in trials by juries that they will return composite findings of law and fact It is wholly illegitimate, in my view, in cases such as the present, by finding in the words of the statute to endeavour to secure for a finding on a pure question of law, or on a mixed question of law and fact that unassailability which properly belongs only to a finding on a question of pure fact "[19]

As their determination is conclusive unless it be erroneous in point of law we have no jurisdiction to review it upon any issue of fact We could of course, interfere if it were clear that the Commissioners had proceeded upon a wrong construction of the Act There is another ground of law upon which, I think the Commissioners are wrong There is upon a true construction of the Act, no evidence in this case upon which their decision can be supported They have given us the relevant facts in detail and we can see for ourselves that, taking those facts as found there are no materials at all upon which the conclusion they reached can be based . If the facts were such that on a true construction of the Act a different conclusion could reasonably be reached, then there would be no power in a court of law to interfere '[20]

It may not always be easy to distinguish between questions of fact and questions of law for the purpose of the Taxes Management Act, 1880 or similar provisions in our Acts of Parliament The views from time to time expressed in this House have been far from unanimous, but in my humble judgment when all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment the question is one of law only "[21]

Per *Lord Sumner* in *Lysaght* v *Commissioners of Inland Revenue*[22]—It is well settled that when the Commissioners have thus ascertained the facts of the case and then have found the conclusion of fact which the facts prove their decision is not open to review, provided (*a*) that they had before them evidence from which such a conclusion could be properly be drawn, and (*b*) that they did not misdirect themselves in law in any of the forms of legal error which amount to misdirection'

It was for the Special Commissioners to find and state all the facts respecting the nature of the office or employment as to which the question arises It was not for the Court to question those facts in any way But the question for the Court was whether upon those facts, Mr Hall held an office or employment of profit within the meaning of the Act That is a question of law "[23]

(19) Per *Lord Atkinson* in *Herbert* v *Samuel Fox & Co* (1916) 1 A C 405 (a case under the Workmen's Compensation Act, 1906)

(20) Per *Earl Loreburn* in *Farmer* v *Cotton's Trustees* 6 Tax Cases 590 (a case relating to Inhabited House Duty)

(21) Per *Lord Parker of Waddington* in *Farmer* v *Cotton's Trustees* 6 Tax Cases 590

(22) (1928) A C 234, 13 Tax Cases 511

(23) Per *Lord Wrenbury* in *Great Western Railway Company* v *Bater*, 8 Tax Cases 254.

"The facts are ascertained for us There is no doubt that in ascertaining from time to time what is a taxable amount it might have an extremely difficult problem, but these facts have been ascertained for us and I do not think it is competent for us to go out of what has already been determined by the tribunal which the Legislature has considered sufficient to determine the form in which such a question, if it arises, should be determined "[24]

"Now partnership or no partnership is a question of fact I agree with the learned Judge that it is a mixed question of fact and law in this case in the sense that if the persons who have to ascertain questions of fact apply a wrong principle of law as to instructing themselves as to what they have to find, then their finding of fact is not conclusive because they have done it according to wrong principles But if they direct themselves properly as to the principles which have to be applied then it is a pure question of fact for the Commissioners "[25]

A finding by the Commissioners that a particular expenditure is in fact capital expenditure does not necessarily foreclose a consideration by the Court of a particular piece of expenditure in the light of the terms of the Income tax Acts themselves [26]

There is hardly a case in which the question whether a particular matter is one of law or of fact does not arise, in fact that is a preliminary point to be considered before there can be a reference to the High Court In addition to the decisions already referred to, the following cases also may be referred to, which have been set out under other sections in the Act —

Cases under Capital and Income—section 3, Casual profits —section 4 (3) (*vii*), those under sections 25 and 26—Succession and Discontinuance, under section 10—Admissible deductions, Capital losses, etc , under section 4—Residence, Place of accrual, Foreign Remittances, etc , and in particular *Ramanatha Reddiar's case*,[26a] in which the leading English cases have been reviewed

Estimating income is a question of fact, and merely because the Income tax Officer disbelieves the assessee no question of law can arise The Allahabad High Court accordingly refused to issue notice in a case to the assessee even though the Commissioner of Income tax referred the case under section 66 (2) [26b]

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(24) Per *Lord Halsbury* in *Smith v Lion Brewery Limited* 5 Tax Cases 568.

(25) Per *M R Sterndale* in *Marden Rigg & Co and E B Eskrigge & Co v. Monks*, 8 Tax Cases 450

(26) *Lothian Chemical Co v Rogers* 11 Tax Cases 508

(26a) 3 I T C 10

(26b) *Bhagat Halwai v Commissioner of Income tax.*

Accountancy—Questions of—

As to the extent to which questions of accountancy are questions of fact or law, see notes under section 13, *Fassett and Johnston v Commissioners of Inland Revenue* and other cases cited thereunder

Question of degree—

Any question which involves an exercise of personal discretion or the determination of a matter of degree is essentially a question of fact and cannot be a question of law [27]

Sub section (8)—

The previous sub sections in the section do not define which High Court should have jurisdiction Because of the use of the definite article 'the' it is clear that the High Court contemplated is the High Court having jurisdiction over the subject matter, that is to say, over the place of assessment The new sub section (8) makes certain exceptions to this principle

Does High Court include Judicial Commissioner?—

Under section 3 (24) of the General Clauses Act, 1887, the 'High Court' includes a Court of a Judicial Commissioner, the definition of a High Court being

> "High Court used with reference to civil proceedings, shall mean the highest civil court of appeal in the part of British India in which the Act or Regulation containing the expression operates"

But it is arguable that, because the Income tax Act, expressly excludes the jurisdiction of Civil Courts, the proceedings are not 'civil' proceedings, and the power given to the High Court under section 66 belongs to it not inherently as a civil court but by express legislative provision In the absence of a definition in the Income tax Act it was contended accordingly that for this purpose the High Court cannot include the Court of a Judicial Commissioner[28] but this was not upheld *See also* the case of *Lucknow Ice Association v Commissioner of Income tax*[29] where it was held that the Chief Court of Oudh which took the place of the Judicial Commissioner of Oudh was the "High Court" for purposes of references arising out of assessments in Oudh A similar question arose with regard to an assessee resident in Peshawar in *Tora Gul Bai v Commissioner of Income tax*[30] In this case the reference was made by the Commissioner to the High Court at Lahore and the High Court held that they had no

(27) *Stubbs v Cooper*, 10 Tax Cases, *Currie v Commissioners of Inland Revenue* 12 Tax Cases 245

(28) *Ramchand Gopaldas v Commissioner of Income tax (Lucknow)*

(29) 2 I T C 156

(30) 2 I T C 164

jurisdiction to hear the reference, as the 'High Court' invested with jurisdiction under section 66 in respect of the North-West Frontier Province was the Court of the Judicial Commissioner of the North West Frontier Province This decision is no longer law as the section subsequently amended by Act XXIV of 1926, specified 'the High Court' as the Lahore High Court

In the case of the *Indian Life Assurance Company, Limited*,[30a] it was decided by the Bombay High Court, and in that of *Bulchand Kesavdas*[30b] by the Judicial Commissioners of Sind, that the High Court in respect of assessments in Sind and for the purpose of this Act is the Judicial Commissioner of Sind

References to be heard by Benches of High Courts and appeal to lie in certain cases to Privy Council

[31] **66-A** (1) When any case has been referred to the High Court under section 66, it shall be heard by a Bench of not less than two Judges of the High Court, and in respect of such case the provisions of section 98 of the Code of Civil Procedure, 1908, shall, so far as may be, apply notwithstanding anything contained in the Letters Patent of any High Court established by Letters Patent or in any other law for the time being in force

(2) An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under section 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council

(3) The provisions of the Code of Civil Procedure, 1908, relating to appeals to His Majesty in Council shall, so far as may be, apply in the case of appeals under this section in like manner as they apply in the case of appeals from decrees of a High Court

Provided that nothing in this sub-section shall be deemed to affect the provisions of sub-section (5) or sub-section (7) of section 66

Provided, further, that the High Court may, on petition made for the execution of the order of His Majesty

(30-a) 33 Bom L. R. 36
(30 b) 128 I C 678
(31) This section was inserted by section 8 of Act XXIV of 1926

in Council in respect of any costs awarded thereby, transmit the order for execution to any Court subordinate to the High Court

(4) Where the judgment of the High Court is varied or reversed in appeal under this section effect shall be given to the order of His Majesty in Council in the manner provided in sub-sections (5) and (7) of section 66 in the case of a judgment of the High Court

(5) Nothing in this section shall be deemed—

(*a*) to bar the full and unqualified exercise of His Majesty s pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

(*b*) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee

History—

This section was introduced in order to overcome the difficulty that had been experienced both by the Government and by the public on account of the conflict of rulings given by different High Courts in respect of questions referred to them under section 66 The section also determines that the reference shall be heard by the High Court by only one bench and that there shall be no appeal from one bench of the High Court to another

It was decided in the case of the *Tata Iron and Steel Company* v *The Chief Revenue Authority, Bombay*,[32] that a judgment of the High Court under section 66 of the Income tax Act (section 51 of the Act of 1918) is not a final order or judgment within the meaning of clause 39 of the Letters Patent of the Bombay High Court, that the judgment was only advisory and that therefore no appeal to the Privy Council lay Now that express provision has been made for appeals to the Privy Council, the decision is obsolete

Appeals from a single Judge—

Following the case of the *Tata Iron and Steel Company* referred to above, it was held by the Calcutta High Court in the

(32) 1 I T C 206

Probhat Chandra Barua case[33] that as the judgment of the High Court under section 66 is not a final judgment within the meaning of the Letters Patent, no appeal lay to a full bench or a divisional bench from the judgment of a single judge. The same view was taken by the Lahore High Court also in the case of *Bulaki Shah and Sons v. The Collector of Lahore*.[34] In the *Probhat Chandra Barua case*, in which the two judges in the divisional bench differed on the merits but agreed that the case should be treated as an appeal under section 36 of the Letters Patent and the decision of the senior judge allowed to prevail, the full bench declined to go into the question whether the decision of the divisional bench that the senior judge's view should prevail was right, on the ground that they themselves, *viz*, the full bench, had no jurisdiction to hear the appeal. These decisions however have now become obsolete. Every reference under section 66 must be heard now by a Bench of at least two judges and if there is a difference of opinion between the two judges the case should be referred to a third judge, and against the decision of the High Court an appeal lies to the Privy Council.

Orders refusing a reference—

An order of a High Court refusing to order the Commissioner to make a reference rests however, on a different footing. In *Johar Lal Uttam Chand v. The Crown*[35] the High Court held that in view of the difference between the provisions of the 1922 Act and those of the 1918 Act the former conferring a right of reference to the High Court—the decision of the *Tata case* could be distinguished and that an appeal lies from an order of a single judge of the High Court refusing to ask the Commissioner to state a case. The same view was also taken by the Madras High Court in the case of *Shiva Prasad Battadu*.[36] *See also* the case of *Ratan Singh v. Commissioner of Income-tax, Madras*.[37]

Even under the 1918 Act appeals were as a matter of fact allowed from the orders of a single judge—see *The North Ananta pur Gold Mines v. Chief Commissioner of Income-tax*[38] and *Jubilee Mills v. Commissioner of Income-tax*.[39]

Under sub-section (1) of the present section it is only a case that has been referred to the High Court under section 66, that is to say, a reference made by the Commissioner, that has

(33) 1 I.T.C. 414
(34) 1 I.T.C. 401
(35) 2 I.T.C. 301
(36) 2 I.T.C. 40
(37) 2 I.T.C. [illegible]34
(38) 1 I.T.C. 133
(39) 2 I.T.C. [illegible]

to be heard by a bench of not less than two judges, etc An application under section 66 (3) need not necessarily be heard by a bench of not less than two judges

No appeal lies to the Privy Council from an order of the High Court under section 66 (3) refusing to direct the Commissioner to make a reference An appeal lies neither under section 66 A nor under Letters Patent in such a case The reason for the absence of provision for an appeal is doubtless that proceedings connected with the assessment of tax are mainly concerned with questions of fact, and that where both the Commissioner and the High Court are agreed that there is no question of law, it is neither convenient nor desirable that the Judicial Committee should be called upon to consider such cases Further if an appeal lay under Letters Patent, an appeal against an order under section 66 (3)—in which both the Commissioner and the High Court agreed that there was no question of law—would lie on less stringent conditions than an appeal against a judgment in a reference made under section 66 (2), and the Legislature could not have contemplated such an anomalous situation[40]

Substantial question of law—

Under sub section (2) no appeal lies to the Privy Council unless the High Court certifies that the case is a fit one for appeal to the Privy Council, that is, the reference involves a substantial question of law

Section 66 A is in terms the same as section 109 (*c*) of the Civil Procedure Code The section is intended to enable an appeal to His Majesty in Council, in cases in which the High Court could certify that the question of law involved was one of great private or public importance The grant of a certificate under section 109 (*c*) of the Civil Procedure Code is not a matter which is left entirely to the discretion of the Court but is a judicial process which could not be performed without special exercise of that discretion—see *Banarsi Prasad* v *Kashi Krishna Narain*[41] and *Delhi Cloth, etc, Mills* v *Commissioner of Income tax*[42]

Certificate will be granted in cases involving questions of public importance or cases forming important precedents governing numerous other cases[43] On the other hand, even if the issue

(40) E M *Chettiyar Firm* v *Commissioner of Income tax, Burma*, 4 I T C 111

(41) 23 All 227 (P C)

(42) 8 Lah 269

(43) *Nattu Kesava Mudaliar* v *Govindasami and others*, 76 Ind Cas 811

is of general importance, leave would be refused if the matter is not of sufficient importance to the respondent to justify his being put to the expense of an appeal to the Privy Council The question whether through a disruption of a Hindu family a particular member had or had not succeeded to the business of the family has not been considered to be a sufficiently important question of law to justify the grant of leave to appeal[44]

Leave to appeal was also refused in the case of *R M S T Ponnuswami Pillai* set out under section 4 (2) in which the issue was whether profits from the growing and manufacture of tea abroad were profits from business

The words "so far as may be" in sub section (3) confine the statutory right of appeal to the Privy Council to the cases described in sub section (2) Even though the requirements of section 110, Civil Procedure Code be satisfied, a High Court is justified in *refusing* a certificate in circumstances in which it would not grant a certificate under section 109 (*c*), Civil Procedure Code[45]

Appeal by special leave—

Sub section (5) makes it clear that in any case it is open to an assessee to appeal to the Privy Council by special leave and that this prerogative right is not affected by the express provision for appeals to the King in Council in the ordinary course

Costs—

The Select Committee added a clause as below —

'Provided that no such certificate shall be granted on an application on behalf of the Secretary of State for India in Council, unless the High Court is satisfied that if the respondent does not appear at the hearing of the appeal and the judgment of the High Court is varied or reversed, the right to recover any costs which may be awarded by the order of His Majesty in Council to the appellant will not be exercised '

This clause was omitted by the Assembly as the result of an undertaking given by the Finance Member that in such cases the Crown would not demand costs

United Kingdom Law—

See section 149 (3) of the 1918 Act which permits of appeals from the High Court to the Court of Appeal and the House of Lords

(44) *Nathumal v Commissioner of Income tax Punjab* A I R 1930 Lah. 109

(45) *Delhi Cloth Mills v Commissioner of Income-tax* 9 Lah. 284 (P C)

67 No suit shall be brought in any Civil Court to set aside or modify any assessment made under this Act, and no prosecution, suit or other proceeding shall lie against any Government officer for anything in good faith done or intended to be done under this Act

Bar of suits in Civil Court

History—

The first part of the section has been the same since 1886; *see* section 39 of the 1886 Act The second part of the section first found a place in the 1918 Act

United Kingdom Law—

There are no corresponding provisions in the law in the United Kingdom *See* however sections 133 (2) and 148 (2) under which an appeal, once determined by the Commissioners, shall be "final and conclusive" and neither the determination of the Commissioners nor the assessment thereon shall be altered except by order of the Court when a case has been stated as provided by the Income tax Act The law in the United Kingdom is governed by various rulings regarding the circumstances in which writs of certiorari and mandamus can be granted or petitions of right will lie The important rulings are set out below

Scope of section—

This section consists of two parts, the first part of which saves assessments made under the Act from interference by a civil court and the second part gives immunity to every Government officer for anything in good faith done or intended to be done under this Act It will be seen that in the first part there is no reference to good faith and intention An assessment which is not strictly in accordance with the Act but purports to be made under the Act will not be set aside or modified by a civil court in so far as the assessee does not avail himself of the remedies provided for him under this Act, *viz*, appeal to the Assistant Commissioner or the Commissioner, as the case may be, and a reference to the High Court under section 66[46] It is only in those cases in which the assessee has exhausted all his rights under the Act and is at the same time the victim of an illegal assessment or other proceeding for which no relief has been provided by the Act, that a civil court can, if at all, interfere

(46) 2 I T C 462

with an assessment See *Holborn Viaduct case*[47] Whenever a statute deals with certain rights, it is right to conclude that it deals with the total ambit of those rights and leaves nothing outside the provisions of the statute[48]

It will be noticed also that the protection from interference by civil courts is only in regard to *assessments* The word 'assessment' has nowhere been defined in the Act, but, obviously it includes the determination of the tax payable by a person, including penal assessments under sections 25 and 28 It presumably also includes refunds under sections 48 and 49 inasmuch as such refunds involve as a preliminary the determination of the tax for which the assessee is liable

The first part of the section clearly does not refer to matters other than assessments, for example, penalties under Chapter VIII or summary proceedings under section 46 for the recovery of tax, etc In respect of all such matters the courts can interfere The second part of the section gives personal immunity to Government officers for anything done by them in good faith or intended to be done under the Act They are protected from prosecution, suit or other proceeding The word 'proceeding' is comprehensive In *Commissioner of Income tax v North Anantapur Gold Mines*,[49] it was held by the Madras High Court, following In re *Onward Building Society*[50] that an application under section 45 of the Specific Relief Act is a 'proceeding' within the meaning of this section of the Income tax Act In the *Onward Building Society's case*—a case under the Companies Act, it was held, with reference to a section which prohibited any "suit, action or other proceeding against the company", that an application against the liquidator of a company directing him to register shares was within the prohibition of the Act

"   gives a summary mode of enforcing rights which might have been prosecuted by a suit in Chancery or possibly by an action for a mandamus at common law It would be impossible to say that if the circuitous proceeding would have been a proceeding against the company that the compendious one is not so also —Per *Bowen L J*

Though the view of the Madras High Court that no proceeding under section 45 of the Specific Relief Act would lie against the Chief Revenue Authority was overruled by the Privy Council in the *Alcock Ashdown case*, the protection given by the second part of the section to officers is unaffected

(47) 2 Tax Cases —8

(48) *Shr boram Singh v Kulsum un Nisa* 49 All 367

(49) 1 I T C 133

(50) (1891) — Q B 463

Anything done—

'Anything done' includes "anything omitted to be done" See *Chief Commissioner of Income tax v North Anantapur Gold Mines*[10] and *Jolliffe v Wallasey Local Board*,[11] also section 3 (2) of the General Clauses Act, 1897, "words which refer to acts done extend also to illegal omissions"

Wrong description of assessee—

It was held in *R N Singha v The Secretary of State in Council*[11a] that the wrong description of the assessee in the notice issued under section 22 (2) would not make the assessment *ultra vires* or wholly illegal *Ultra vires* and erroneous are not synonymous terms The assessee could have availed himself of the remedies provided by the Income tax Act if he desired to challenge the assessment The Court therefore declined to interfere

In good faith —

Under section 3 (20) of the General Clauses Act (X of 1897) a thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not

Section 106 Government of India Act—

Under sub section (2) of section 106 of the Government of India Act, High Courts are prohibited from exercising

> any original jurisdiction in any matter concerning the revenue or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force

It was held in *Commissioner of Income tax v North Anantapur Gold Mines*[1] that this section prevented the High Court from issuing a mandamus to the Income tax Commissioner asking him to state a case for the decision of the High Court In In re *Doraisamy Iyer & Co*[13] and In re *the Bombay and Persia Steam Navigation Company*,[14] the Bombay High Court held a different view The Privy Council in the *Alcock Ashdown case*[1] overruled the view of the Madras High Court and confirmed that of the Bombay High Court But all these decisions have become obsolete so far as this particular aspect of the matter is concerned, *viz*, how far section 106 of the Govern

(1 10) 1 I T C 133

(11) (18 3) L R 9 C P 62

(11a) 2 I T C 467

(12) 1 I T C 153

(13) 1 I T C 9

(14) 1 I T C 53

(15) 1 Tax Cases 221

ment of India Act stands in the way of the High Courts interfering, in view of the definite provision now in section 66 (3) empowering the High Court to call upon the Commissioner to state a case

Section 32, Government of India Act—

Under section 32 of the Government of India Act "every person shall have the same remedies against the Secretary of State for India in Council as he might have had against the East India Company if the Government of India Act, 1858, had not been passed" Relying on this section, it was argued in *Dr R N Singha* v *Secretary of State*[16] that section 67 of the Income tax Act was *ultra vires* But the contention was not accepted Before 1858 there was no such thing as income tax, and unless it could be shown that a suit for the recovery of revenue of the nature of income tax wrongly assessed would have lain against the East India Company before 1858, no suit for the recovery of income tax wrongly assessed could be entertained

In *Spooner* v *Juddow*[17] with reference to section 8 of the East India Company's Act, 1780 (corresponding to section 106 of the Government of India Act, 1915) which was in the following terms —

"The said Supreme Court shall not have or exercise any jurisdiction in any matter concerning the revenue or concerning any act or acts ordered or done in the collection thereof according to the usage and practice of the country or the regulation of the Governor General in Council" [THE PRIVY COUNCIL OBSERVED] 'The point therefore, is whether the exception of jurisdiction only arises where the defendants (the Revenue authority) have acted strictly according to the usage and practice of the country and the regulations of the Governor General in Council But upon this supposition the proviso is wholly nugatory, for, if the Supreme Court is to enquire whether the defendants in this matter concerning the public revenue were right in the demand made and to decide in their favour only if they acted in entire conformity to the regulations of the Governor General in Council they would equally be entitled to succeed if the statutes and charters contained no exception or proviso for their protection Our books actually swarm with decisions putting a contrary construction upon such enactments and there can be *no rule more firmly established than that if parties bona fide* and not absurdly believe that they are acting in pursuance of statutes, and according to law they are entitled to the special protection which the legislature intended for them although they have done an illegal act"

"I agree that if a person knows that he has not under statute authority *to do a certain thing* and yet intentionally does that thing he cannot shelter himself by pretending that the thing was done with intent to carry out that statute In this case nothing is stated showing that the

(16) 2 I T C 402
(17) (1850) 4 M I A 353

defendants when they made the rate in question knew that it was not allowed by the statute under which they were appointed, and it has not been found that the defendants were trying under the colour of the law to get money to which they had no right, in which case they would not have been protected by the Act"

Per *Blackburn, J*, in *Selmes* v *Judge*[18] a Highway Rating case in which it was held with reference to a statutory provision which said that "no action or suit shall be commenced against any person for anything done in pursuance of or under the authority of this Act until notice has been given . " that such notice was necessary in so far as the rating was made *bona fide*

Excess of jurisdiction—

"There must of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends But those conditions may be founded either on the character and constitution of the tribunal or upon the nature of the subject matter of the inquiry or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry It is obvious that conditions of the last differ materially from those of the three other classes Objections founded on the personal incompetency of the Judge or on the nature of the subject matter or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the fact of the proceedings or brought before the Superior Court by affidavit, are extrinsic to the adjudication impeached But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject matter, he properly entered upon the enquiry but miscarried in the course of it The Superior Court cannot quash an adjudication upon such an objection without assuming the functions of a court of appeal and the power to re try a question which the Judge was competent to decide Per *Colvile, Sir, J*, the Privy Council in *Colonial Bank of Australasia* v *Willan*[19]

Lord Esher (Master of the Rolls) considered the formula in *Reg* v *Commissioners for Special Purposes of Income tax*[20] and said

"When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things it shall have jurisdiction to do such things but not otherwise Then it is not for them conclusively to decide whether that state of facts exists,

(18) (1874) L R. 6 Q B 724
(19) 5 L R P C 417
(20) (1888) 21 Queen's Bench Division, 313 at page 319

and if they exercise the jurisdiction without its existence, what the[y] may be questioned, and it will be held that they have acted wit[hout] jurisdiction But there is another state of things which may exist. Legislature may entrust the tribunal or body with a jurisdiction, w[hich] includes the jurisdiction to determine whether the preliminary sta[te] proceed further or do something more When the Legislature are e[stab]lishing such a tribunal or body with limited jurisdiction, they also to consider, whatever jurisdiction they give them, whether there sha[ll be] any appeal from their decision for otherwise there will be none In second of the two cases I have mentioned it is an erroneous applicatio[n of] the formula to say that the tribunal cannot give themselves jurisdi[ction] by wrongly deciding certain facts to exist, because the Legislature [gave] them jurisdiction to determine all the facts, including the existenc[e of] the preliminary facts on which the further exercise of their jurisdi[ction] depends, and if they were given jurisdiction so to decide, without appeal being given there is no appeal from such exercise of t[heir] jurisdiction "

An English Company acquired an English business wh[ich] included the shares of two continental companies, it also inclu[ded] 98 per cent of the shares of an American company carrying business in America with the result that, according to the p[ros]pectus, all the companies concerned came under one single gen[eral] control The General Commissioners found that the busi[ness] of the American company was as a fact carried on by and [was] the business of the English company and taxed the pro[fits] accordingly A rule *nisi* was granted against the General Co[m]missioners by the Court of Appeal but was discharged on [the] ground that it was within the jurisdiction of the Commission[ers] to ascertain what was the connection between the English [and] American Companies and that if the Commissioners had g[one] wrong the remedy was by way of appeal and not by prohibiti[on]. The Commissioners had not gone wrong in the finding of [any] facts preliminary to giving themselves jurisdiction The Engl[ish] company was engaged in trade in the United Kingdom and Commissioners had jurisdiction to find out the limits of the tr[ade] so carried on in order to fix the *quantum* The only condit[ion] which was the essential preliminary to the Commissioners hav[ing] jurisdiction was that the trader carried on the trade at least [in] part in the area of the Commissioners [20a]

"In my judgment this dictum (of Lord Esher quoted abo[ve]) states accurately the principle applicable to such cases The last quest[ion] is within which class should the present case be placed? *Allen [v.] Sharp*[20b] is a decision which appears to me in point, and is based u[pon]

(20a) *R v General Commissioners for Clerkenwell*, Ex parte *Kalak, Ltd* [v.] *Clark*, 4 Tax Cases 549

(20b) (1848) 2 Exchequer, page 352

these sections of the Act of 43, George III, Chapter 99, and Chapter 161, to which I have already referred Baron Parke, at page 363, draws the distinction between the case then under consideration and cases under the Statutes relating to poor rate[20c] and his observations are so important and bear so immediately upon the present case that I quote them *in extenso* "On a careful consideration of these Acts of Parliament, they seem to me to differ from the Statute of Elizabeth as to poor rate, and that the Legislature intended that the assessment of the assessors appointed by the Commissioners should be final and conclusive unless appealed from, in the first place, to the Commissioners, and further, if necessary to the Judges of the superior Courts It would be singular if there were no such provision, for what a flood of litigation would follow, if every subject of the Crown, who was dissatisfied with the judgment of the assessors had a right to dispute the property of their assessment in an action against the collectors without referring to the Statutes, I should say, *a priori* that the object of the Legislature was to make the decision of the assessor final and binding, unless disputed in the manner pointed out On reading the Statutes, I come to the same conclusion By the 9th Section of the 43, George III, Chapter 99, the Commissioners are to meet and appoint assessors who are to bring in their certificates of assessment verified on oath, and the assessors are thereby required with all care and diligence, to charge and assess them selves and all other persons chargeable with the said duties If the language had been 'to charge and assess all such persons as they honestly and *bona fide*, after due care and diligence, believed to be chargeable' their assessment would beyond all question be final", and he found that under Statutes 43, George III, Chapter 99 and Chapter 161, the only remedy was by appeal to the Commissioners It was argued in that case that the Legislature meant that the decision should be final only in respect of such persons as were liable to be rated but were rated for too much Baron Parke held that the word ought not to receive so narrow a construction and that it meant in these Statutes rating when the party ought not to be rated at all No such question can now arise, as by Section 57 (3) of the *Act of 1880* the right of appeal to the Commissioners is given to any person aggrieved by an assessment In my judgment the decision and reasoning of Baron Parke and the other learned Judges have a direct bearing upon the present application for prohibition

"In my view an examination of the Income tax Acts shows that the scheme of the Legislature is to entrust the decision of the facts to a tribunal of persons specially selected for the locality, and who are often in a better position than the Courts to determine the questions of fact sometimes very complicated, which may arise The exigencies of the State require that there should be a tribunal to deal expeditiously, and at comparatively little expense with all such questions, and to decide them finally, reserving always to the individual the right to have the Commissioner's decisions on points of law reviewed by the Courts The obligation is placed, for reasons of expediency, upon the person assessed to

(20c) See *Weaver* v *Price*, 3 Barnewal and Alderson, page 409

appeal to the Commissioners if he wishes to rid himself of an assessment which is, in his view, based upon wrong conclusions of fact, and this obligation rests equally upon a person who contends that he is not chargeable as upon a person who admits that he is chargeable, but not to the extent of the assessment made upon him

"In my judgment the Surveyor had therefore material before him, upon which he could come to the conclusion that there was a partnership between the Applicant and Jackson at 125, High Holborn, apart altogether from the difficult questions relating to the Companies, and that the Additional Commissioners had jurisdiction to assess the Applicant in respect of such partnership Once that conclusion is reached, it follows that they had jurisdiction to decide all questions of fact relating to the assessment of the partnership This proposition is really not in dispute, and, indeed, it has been affirmed in *Rex v General Commissioners of Taxes for Clerkenwell*[20d] where it was held that in these circumstances the Applicant's remedy is by appeal and not by prohibition An argument closely resembling that of the present Applicant was there advanced in support of an application for prohibition, against the Commissioners It was there contended that the Commissioners had only acquired jurisdiction to assess the duty by an erroneous finding of facts, and therefore that the prohibition should issue, but the Court of Appeal discharged the Rule They held that the remedy was by appeal on the ground that there was jurisdiction to charge a trader in respect of the whole profits of his trade if he is found within the district carrying on the trade in part, and that they had jurisdiction to decide all questions of fact necessary for making the full assessment and therefore to determine the true extent of the trade (Per *Lord Justice Stirling* page 885) "—Per *Lord Reading, C J*[20e]

"In such a case it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist because the Legislature gave them jurisdiction to determine all the facts including the existence of the preliminary facts of which the further exercise of their jurisdiction depends, see also *The Colonial Bank of Australasia v Willan,*[20f] and the principle of law to be applied to this case is that laid down by Chief Justice Tindall in *Cave v Mountain*[21] where he says dealing with a question of the jurisdiction of magistrates If the charge be of an offence over which, if the offence charged be true in fact the magistrate has jurisdiction the magistrate's jurisdiction cannot be made to depend upon the truth or falsity of the facts or upon the evidence sufficient or insufficient to establish the *corpus delicti* brought under investigation " and that the remedy for any person aggrieved by an assessment made under Section 52 either by reason of his not being chargeable at all or by reason of its being

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(20d) (1901) 2 K B 879

(20e) *Rex v Commissioners of Taxes for Bloomsbury* 7 Tax Cases 66

(20f) 5 L R P C 442

(21) 1 Macnaghten and Gorden, page 257 (approved and adopted by Lord Denman in *Reg v Bolton*, 1 Queen's Bench, page 75)

excessive, is by appeal to the General Commissioners and by special case—Per *Avory, J*[22]

No writ of prohibition can lie merely because the Revenue authorities come to a wrong finding of fact as to liability, *e g* as to income Such a finding does not involve an excess of jurisdiction[23]

If what happened before the inferior tribunal was a refusal to hear the case, a mandamus would lie, but if what had taken place was in fact that upon the materials before them they had come to a wrong decision that could not be made a ground for directing and rehearing Procedure by way of mandamus is not procedure by way of appeal[24]

In England the Courts cannot interfere on the ground that the Commissioners should have heard the evidence tendered and should not have dispensed with it In a case in which the Commissioners refused to hear an expert valuer whose evidence was tendered by the assessee, the Court considered that, as the Commissioners had been told the nature of the evidence and came to the conclusion that it would be of no help, there was no 'refusal to hear the case' which alone would justify the issue of a mandamus[25]

"If I was satisfied that the Commissioners had entertained a different question I should not have hesitated to make the rule absolute It has long been recognised that when a tribunal of this kind acts within their jurisdiction on a matter properly before them, although they have gone wrong in law in the way they have applied the rules of law to their judgment or have gone wrong in fact, it is not for us to interfere '[25]

* * * * * but for myself I wish to express the opinion, as at present advised, that prohibition would not lie in this case at this stage, on the ground that the general principle is that the proceedings to be prohibited must be of a judicial character, and not belonging to the executive Government As Lord Denman said in the case of *Chabot v Lord Morpeth* (15 Q B 457) "Were we to grant prohibition in this case, we should be interfering with proceedings not judicial, but belonging to the Executive Government of the country"[26]

"My view of the power of prohibition at the present day is that the court should not be chary of exercising it and whenever the Legis-

(22) *Rex v Commissioners of Taxes*, 7 Tax Cases 68

(23) *Rex v The Swansea Income tax Commissioners* (Ex parte the *English Crown Spelter Co*), 9 Tax Cases 437

(24) Per *Lord Alverstone* in *R v General Income tax Commissioners of Offlow* (27 T L R 353) Followed in *R v General Income tax Commissioners of Winchester*

(25) Per *Lord Alverstone* in *R v Commissioners for the City of London* (Ex parte *Commissioners I R*), (1904) 91 L T 94

(26) Per *Avory, J*, in *The King v Kensington Commissioners*, 6 Tax Cases 287 and 88

lature entrusts to any body of persons other than to the Superior Courts the power of imposing an obligation on individuals, the courts ought to exercise as widely as they can the power of controlling those bodies or persons if these persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament" per *Brett, L J* (afterwards *Lord Esher*) in *R* v *Local Government Board*,[27] quoted with approval by *Swinfen Eady, L J*, in *R* v *Kensington Income tax Commissioners*[28]

As a result of information disclosed in connection with a claim for relief, additional assessments were made in respect of under charged tax and at the same time relief was withheld by the Inspector of Taxes Rules *nisi* were issued calling upon (1) the General Commissioners to show cause why a writ of prohibition should not issue prohibiting additional assessments, and (2) the Inspector of Taxes to show cause why writs of *certiorari* and mandamus should not issue quashing his refusal to certify the claim for relief *Held* discharging the rules that both the General Commissioners and the Inspector acted within their jurisdiction

Per *the Lord Chief Justice Hewart* —The question whether there should be a writ of prohibition is a question whether that which is being done is or is not being done without jurisdiction The Surveyor says that he discovers that a person chargeable has been allowed a reduction not authorised by this Act Mr Montgomery concedes that the question whether the deduction is or is not authorised by the Act is a question within the jurisdiction of the Surveyor to determine In that part of the argument Mr Montgomery appeared to say—I do not know if he seriously meant it—that if the Surveyor decided the question correctly the matter was within his jurisdiction but if he decided it incorrectly the matter was not within his jurisdiction If that be indeed the argument it appears to me to confuse two things an erroneous decision within the jurisdiction and a usurpation of a jurisdiction which does not exist I think it is a fact that the question which had to be determined here was a question within the jurisdiction of the Surveyor and if there is exception taken to the additional assessment there is a clear right of appeal under the Act and that right of appeal is at this present moment being pursued I think therefore that the application for the writ of prohibition manifestly fails

I pass now to the rules for mandamus and *certiorari* which relate really to two aspects of the same matter The applicants went to the Surveyor and produced certain figures showing cost of maintenance, repairs, insurance and management and it is said that so far as arithmetic is concerned those figures were beyond dispute and it is said that the Surveyor had no choice except to give a certificate If that were true interpretation it would follow that if the arithmetic

(27) (1882) 10 Q B D 309

(28) 6 Tax Cases 613

were correct in the statement produced to the Surveyor then notwithstanding that upon a review of all the relevant facts he was clearly and rightly of opinion that the owner was not entitled to any allowance at all he must proceed to make a certificate of allowance based on the figures produced to him and once the owner had got that document in his possession, it would be like a Bank of England note he would immediately proceed to recover payment in accordance with that certificate I cannot think that the Legislature intended to enact anything so grotesque The Surveyor here having the figures before him came to the conclusion that the owners, notwithstanding those figures, were not entitled to any allowance he certified that the owners in question were not entitled to any repayment and he proceeded to give his reasons There also as it seems to me, the Surveyor was acting within his jurisdiction It may well be that the applicants for these rules are not satisfied with the conclusion at which he arrived But that being so, they have in this matter as in the matter a right of appeal and that appeal they are pursuing "[29]

You are entitled to say, as against certain Commissioners that the order ought to go if as Lord Reading says there was no doubt as to the facts and if you were convinced that by no possibility could it be held that there was a liability on the subject as for instance if the General Commissioners of Income tax had purported to make an assessment on a man in respect of super-tax which is specially assigned to the Special Commissioners but applying the rule of Lord Reading in the *Singer case*, there is sufficient evidence here and (the General Commissioners) are entitled not merely to consider the matter geographically but also fundamentally as to whether there is a liability '[30]

Indian Rulings under the 1886 and 1918 Acts—

Whether a particular person is in receipt of a particular income is a question to be primarily determined by the Income tax Officer, that is to say, it is a question of fact entirely within his jurisdiction The Civil Court cannot interfere and set aside the finding of the Income tax Officer [31]

Where the assessee contended, unsuccessfully before the Taxing Officer that his income was below the taxable limit and filed a suit to recover the tax paid by him on the ground that he was not liable to be taxed under Act, section 39 of the Act of 1886 was held to be a bar to the suit [32]

"If he has assessed income, then even if his assessment is wrong the Civil Court cannot interfere by reason of section 39 of the Act If he has assessed something which is not income, then he has acted without jurisdiction. "Income signifies what comes in It is as large a word as can be used" (*see* Stroud's Judicial Dictionary) The plaint sets forth

(29) *R v Commissioners of Kingsland*, 8 Tax Cases 327

(30) *Per* M of R Hanworth *R v General Commissioners, Marylebone* (Ex parte *Schlesinger*), 13 Tax Cases 746, 7 A T C 101

(31) See *Forbes v Secretary of State*, 1 I T C 8

(32) *Swaminatha Iyer v Secretary of State*, 1 I T C 25

what the plaintiffs calls net income This is not an expression to be found in the Act The Act defines income and deals with income It *cannot be denied that the total sum on which the plaintiff has been* assessed is income This is implied in the plaint itself The Collector, therefore had jurisdiction to assess tax on it The plaintiff claims that he is entitled to deduct Government revenue from the income The Collector decided that he was not so entitled but this again was a matter *within the jurisdiction of the* Collector If the Collector is to assess income *tax at all, he must decide how much comes in and* what the outgoings to be legitimately deducted are There is no dispute in this case as to what came in The dispute is as to outgoings This is for the Collector I am wholly unable to see that anything has been done *ultra vires* ' [33]

"On the general principle on which the Civil Court interferes in such cases there is no doubt Where an authority is by Statute vested with exclusive powers over any subject matter, then so long as these powers are exercised on that subject matter the Civil Court cannot *interfere, but if the authority purports to exercise these powers* on what is not that subject matter, then the Court will interfere, because the authority is not acting under the Statute and is not protected thereby As it was stated in *Chairman of Giridih Municipality* v *Srish Chandra Mozumdar* "The true test is whether there has been a substantial disregard of the provisions of the law which creates the authority and regulates its powers and duties ' [33]

On the other hand in *Haji Rehemtulla Haji Tar Mahomed* v *Secretary of State*[34] in which the question arose where profits accrued or arose, the Bombay High Court allowed a suit on the ground that the assessment was clearly *ultra vires*

In *Raja of Ramnad* v *Commissioner of Income tax, Madras*,[35] the Madras High Court said that the bar against would not apply a civil suit imposed by section 52 of the 1918 Act if the assessment was made in respect of an item of income clearly not assessable under the Act, and that in *cases in* which the Income tax Officer had to decide whether a certain item of income was assessable or not his decision need not be *ultra vires* even if it was illegal

These decisions and dicta are evidently obsolete now since the present Act provides the assessee with the right to demand a reference to the High Court on questions of law.

It was suggested, however, in passing in the judgment in *Dunichand* v *Commissioner* of *Income tax, Punjab*,[36] that even under the present Act a suit may lie if the assess-

(33) Per *Ross, J*, in *Secretary of State for India* v *Forbes*, 1 I. T C 23

(34) 2 I T C 118

(35) 3 I. T C 263

(36) 4 I T C 33

ment is *ultra vires* On the other hand, see *R N Singha* v *Secretary of State in Council* [37]

Illegal composition of tax—Not binding—

A proprietary life assurance company established in the United Kingdom, had for some years been assessed to income tax on the income basis of its untaxed income received in the United Kingdom The basis of assessment was altered to a 'profits' basis, liability being calculated by reference to the surplus shown as the result of the last quinquennial valuation For the next few years the Society was assessed on the new basis but afterwards in consequence of legislation altering the basis of taxation of income arising from foreign property the company was assessed on an income basis The company produced correspondence with the Surveyor of Taxes which they averred, amounted to an agreement that the Crown was bound for five years to assess the company on the 'profits' basis, and asked for a declaration that the said agreement was valid and binding, and for an injunction restraining the Commissioners of Inland Revenue from enforcing or in any way acting upon the assessment made on the 'income' basis *Held,* that the construction which the Society sought to put on the agreement was not a true one and that, if it were true, such an agreement would be invalid and *ultra vires* both as regards the Surveyor of Taxes and the Commissioners of Inland Revenue The question whether, having regard to the right of appeal allowed under section 57 of the Taxes Management Act, 1880, it was a proper case for a declaratory order against the Attorney General was raised but not determined [38]

Remedy under Income tax law not exhausted—Civil Court will not interfere—

A company had been wrongly assessed, on the basis of its own returns, twice over in respect of a certain portion of its income for a series of years A claim for refund was made on the Commissioners of Inland Revenue who were prepared to agree to a compromise on equitable lines The Company did not accept the compromise and then brought in a petition of right *Held* (by Stephen, J), that no petition of right lay, the grounds for the decision being (1) if the case was one of double assessment, a remedy was prescribed by the Income tax Act under which the Commissioners of Inland Revenue were the sole judges

(37) 2 I T C 462

(38) *The Gresham Life Assurance Society Limited* v *Attorney General* 7 Tax Cases 36

of whether a double assessment had been made, (2) if the case was one of over-charge, the remedy was by way of appeal, and (3) in any case the claim for refund was time barred being more than three years old[39]

A person, an advisory engineer by profession, refused to make a return for Excess Profits Duty on the ground that he was exempt and sought a declaration to that effect The High Court, without going into the merits of the case, declined to make a declaration because there was an appropriate remedy by way of appeal prescribed[40] See also *R N Singha* v *Secretary of State in Council*[41]

Tax—Paid under Coercion—Whether—

"To succeed in a suit for refund of tax paid it is incumbent on the plaintiff to show that the payment has been made under coercion

but it may be assumed for the purposes of this case that there was coercion within the meaning of section 72 of the Contract Act as interpreted by the Privy Council in *Kanhya Lal* v *National Bank of India*,[42] per *Jenkins, C J* in *Forbes* v *Secretary of State*[43]

In *Raja of Ramnad* v *Commissioner of Income tax, Madras*,[44] in which the assessee had included in his return of income non taxable income and was taxed thereon, it was held that the payment having been made voluntarily by mistake, and not by duress or coercion, no suit for recovery of tax lay in any circumstances

67-A In computing the period of limitation prescribed for an appeal under this Act orfor an application under section 66, the day on which the order complained of was made, and the time requisite for obtaining a copy of such order, shall be excluded

Computation of periods of limitation

History—

This is a new section inserted by Act XXII of 1930 and removes doubts that had been felt as to the applicability of section 12 of the Indian Limitation Act to income tax proceedings

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(39) *Holborn Viaduct Co* v *R* 2 Tax Cases 228

(40) *Smeeton* v *Attorney General* (1920) 1 Ch 85, 12 Tax Cases 166

(41) 2 I T C 462

(42) 40 Cal 598

(43) 1 I T C 8

(44) 3 I T C 264

See *Muhammad Hayat Haj Muhammad v Commissioner of Income tax, Punjab* [45]

Scope—

The section applies only to appeals under this Act (*see* sections 30, 32 and 33 A) and to applications for a reference to the High Court under section 66 The section follows section 12 of the Indian Limitation Act

68 [* * * * * *]

Repeals—

Both this section 68 and the schedule of enactments repealed have been repealed by the Repealing and Amending Act, 1927 (XII of 1927)

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(45) 3 I T C 319, *Ramanatha Reddiar's case*, 3 I T C 10 and *Mohanlal Hardeodas' case*, 4 I. T C 90

EXTRACT FROM

THE INDIAN FINANCE ACT, 1930.

6 (1) *Income tax for the year beginning on the first day of* April, 1930, shall be charged at the rates specified in Part I of the Third Schedule

(2) The rates of super tax for the year beginning on the first day of April, 1930, shall, for the purposes of section 55 of the Indian Income tax Act, 1922 be those specified in Part II of the Third Schedule

(3) *For the purposes* of the Third Schedule "total income" means total income as determined for the purposes of income tax or super tax as the case may be in accordance with the provisions of the Indian Income tax Act, 1922

SCHEDULE III

PART I

Rates of Income tax

	Rate
A In the case of every individual Hindu undivided family unregistered firm and other association of individuals not being a registered firm or a company	
(1) When the total income is less than Rs 2 000	*Nil*
(2) *When the total income is Rs 2 000* or upwards but is less than Rs 5 000	Five pies in the rupee
(3) When the total income is Rs 5 000 or upwards but is less than Rs 10 000	Six pies in the rupee
(4) When the total income is Rs 10 000 or upwards but is less than Rs 15 000	Nine pies in the rupee
(5) When the total income is Rs 15 000 or upwards but is less than Rs 20 000	Ten pies in the rupee
(6) When the total income is Rs 20 000 or upwards but is less than Rs 30 000	One anna and one pie in the rupee
(7) When the total income is Rs 30 000 or upwards but is less than Rs 40 000	One anna and four pies in the rupee
(8) When the total income is Rs 40 000 or upwards	One anna and seven pies in the rupee
In the case of every company, and every registered firm whatever its total income	One anna and seven pies in the rupee

PART II

Rates of Super tax

In respect of the excess over fifty thousand rupees of total income—

	Rate
(1) In the case of every company	One anna in the rupee
(2) (*a*) in the case of every *Hindu undivided family*—	
(*i*) in respect of the first twenty five thousand rupees of the excess.	*Nil.*

	Rate.
(ii) for every rupee of the next twenty five thousand rupees of such excess.	One anna and one pie in the rupee
(b) in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company for every rupee of the first fifty thousand rupees of such excess.	One anna and one pie in the rupee.
(c) in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or company.	
(i) for every rupee of the second fifty thousand rupees of such excess	One anna and seven pies in the rupee
(ii) for every rupee of the next fifty thousand rupees of such excess	Two annas and one pie in the rupee
(iii) for every rupee of the next fifty thousand rupees of such excess	Two annas and seven pies in the rupee
(iv) for every rupee of the next fifty thousand rupees of such excess.	Three annas and one pie in the rupee
(v) for every rupee of the next fifty thousand rupees of such excess	Three annas and seven pies in the rupee
(vi) for every rupee of the next fifty thousand rupees of such excess	Four annas and one pie in the rupee.
(vii) for every rupee of the next fifty thousand rupees of such excess	Four annas and seven pies in the rupee
(viii) for every rupee of the next fifty thousand rupees of such excess	Five annas and one pie in the rupee
(ix) for every rupee of the next fifty thousand rupees of such excess	Five annas and seven pies in the rupee
(x) for every rupee of the remainder of the excess	Six annas and one pie in the rupee.

History—

Since the present Act was framed, *i.e.*, since 1922, the rates of tax are levied from year to year by the Annual Finance Act. *See* notes under section 3. The Income-tax Act is, broadly speaking, an Act of machinery and procedure, as well as of the general principles of liability.

Total Income—

Note that a different definition has been adopted from that in section 2 (15) of the Income-tax Act. This is presumably because of section 26 of the latter Act and other provisions deeming certain items to be income.

Association of individuals—

The provision for the taxation of 'associations of individuals' was made by Act XI of 1924.

Rates of Income-tax—

It will be noticed that companies and registered firms are taxed at the maximum rate irrespective of their total income. As regards the refunds admissible to shareholders in companies and partners of registered firms, *see* section 48.

Unregistered firms—

As regards the taxation of partners of unregistered firms, *see* notes under section 2 (14) and (16) and section 14

Hindu undivided family—

As regards the taxation of individual members of Hindu undivided families, *see* notes under section 2 (9) and section 14

Rates of Super-tax—

Note that unlike Part I of the Schedule in which there is a single rate for the whole income fixed with reference to the total income, successive 'slabs' of income bear different rates of super-tax It is this difference in the scheme of the two taxes that is responsible for the slight difference in wording between sections 3 and 55 *See* notes under these sections respectively

Provisional Collection of Taxes Act—

In India the Provisional Collection of Taxes Act applies only to taxes of the nature of Excise or Customs, and cannot therefore apply to Income tax No tax can therefore be recovered until and unless the Finance Act has been passed In the United Kingdom the law is different

N B—References to sections above are to the Income tax Act

THE
GOVERNMENT TRADING TAXATION ACT, 1926.
ACT III OF 1926

TO

Determine the liability of certain Governments to taxation in British India in respect of trading operations

WHEREAS it is expedient to determine the liability to taxation for the time being in force in British India of the Government of any part of His Majesty's Dominions, exclusive of British India, in respect of any trade or business carried on by or on behalf of such Government, it is hereby enacted as follows —

Short title and commencement

1 (1) This Act may be called THE GOVERNMENT TRADING TAXATION ACT, 1926

(2) It shall come into force on such date[1] as the Governor-General in Council may, by notification in the *Gazette of India*, appoint

Liability of certain Governments to taxation in respect of trading operations

2 (1) Where a trade or business of any kind is carried on by or on behalf of the Government of any part of His Majesty's Dominions, exclusive of British India, that Government shall, in respect of the trade or business and of all operations connected therewith, all property occupied in British India and all goods owned in British India for the purposes thereof, and all income arising in connection therewith, be liable—

(*a*) to taxation under the Indian Income tax Act, 1922, in the same manner and to the same extent as in the like case a company would be liable,

(*b*) to all other taxation for the time being in force in British India in the same manner as in the like case any other person would be liable

(2) For the purposes of the levy and collection of income-tax under the Indian Income tax Act, 1922, in accordance with the provisions of sub section (1), any Government to which that sub section applies shall be deemed to be a company within the

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(1) The Act came into force with effect from the 1st April, 1926

meaning of that Act, and the provisions of that Act shall apply accordingly

(3) In this section the expression "His Majesty's Dominions" includes any territory which is under His Majesty's protection or in respect of which a mandate is being exercised by the Government of any part of His Majesty's Dominions

History—

This Act is the outcome of a resolution of the Imperial Economic Conference in 1923 at which the Dominions of the British Empire decided to waive *inter se* their immunity from taxation under the laws of other dominions This question of immunity is a much discussed one under international law, and the present Act places the position beyond doubt so far as Dominions of the British Empire are concerned

Foreign countries—

This Act does not apply to countries outside the British Empire The liability of such countries to British Indian tax and that of British India to tax in such countries depends on international law

His Majesty's Dominions—

This is a special definition and cannot be extended to other purposes It was ruled by the Allahabad High Court that the Tehri State in which the British Government under a treaty, "guarantee the Rajah and his posterity in the secure possession of the country and defend him against his enemies", is a territory which is under His Majesty's protection within the meaning of the Government Trading Taxation Act

It was argued in the *Tehri State case* that under section 65 of the Government of India Act which confines the jurisdiction of the legislation to *persons* within British India the Government Trading Taxation Act is *ultra vires* since Indian States are not 'persons within British India' Following section 19 of the English Interpretation Act 1889 the Allahabad High C[illegible] held that the persons governing a State—whether indivi[illegible] bodies, carrying on business in British India came wit[illegible] scope of the Indian legislature's law making powers [illegible] the object of the Act is to tax income acquired in Briti[illegible] (*i e* a thing in British India), and not to tax anythi[illegible] by a Government in its own territory

Income from trading—

This Act applies only to profits from trad[illegible] from securities is taxed at source, and is exempt [illegible]

THE

GOVERNMENT TRADING TAXATION ACT, 1926.

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It was argued in the *Tehri State case* that under section 65 of the Government of India Act which confines the jurisdiction of the legislation to *persons* within British India the Government Trading Taxation Act is *ultra vires* since Indian States are not persons within British India Following section 19 of the English Interpretation Act 1889 the Allahabad High Court held that the persons governing a State—whether individuals or bodies, carrying on business in British India came within the scope of the Indian legislature s law making powers Further, the object of the Act is to tax income acquired in British India (*i e* a thing in British India), and not to tax anything earned by a Government in its own territory

Income from trading—

This Act applies only to profits from trading Income from securities is taxed at source, and is exempt to the ex

allowed under section 60—*see* Notifications under section 60 *See also* Introduction as to the liability of States to tax generally

Trade or business—

As to what constitutes trade or business—*see* notes under section 2 (4) of the *Income tax Act*

And of all operations connected therewith—

This expression corresponds in a measure to the words 'business connection' used in section 42 (1) of the Income tax Act The idea is to widen the connotation of the words 'trade and business'

Property occupied in British India—

This applies only to property used for trade or business or operations connected therewith This Act does not determine the liability of property occupied otherwise than for purposes of trade

Notice—

Under section 2 (2) it will be necessary for the Income tax Officer to serve a notice on some person connected with the dominion or state and treat him as 'principal officer'

APPENDICES

APPENDIX I.

ACTS BEFORE 1886

THE first general income-tax was levied in 1860 Prior to this date there had been various local taxes on trade, etc, which were really the survival of native *regimes*

The Income tax Act of 1860 (Act XXXII of 1860 amended by XXXIX of same year by XXI of 1861, by IX and XVI of 1862, by XXVII of 1863) remained in force till 1865

The law of 1860 was modelled very closely on the English Income tax Law In fact the schedules and various other provisions were *verbatim* reproductions of the sections in the English Acts

Application—To all incomes and profits arising from property, professions, trades and offices not being less than Rs 200 per annum the non taxable limit was raised to Rs 500 by Act XVI of 1862

Rate of Assessment—Two per cent on incomes, etc between Rs 200 and 500 per annum, 4 per cent on incomes etc above Rs 500 1 per cent of the latter rate was intended to provide for Public Works charges The rate was reduced to 3 per cent by Act XXVII of 1863

Exemptions—(1) Military and Police officers whose pay was less than that of a Captain of Infantry (Rs 415 a month)

(2) Naval and Indian Marine officers whose pay did not exceed that of a Naval Lieutenant (Rs 175 a month)

(3) Cultivators of land, the rent value of which was less than Rs 600 per annum

(4) Religious and charitable institutions (this last at the discretion of the Local Governments subject to the approval of the Governor General in Council)

2 **A license tax on trades, etc**, carried on by men who did not fall within the scope of the Income Tax Act or whose profits were less than Rs 200 per annum was imposed by Act XVIII of 1861 Traders of this description were divided into three classes at the discretion of the assessing officers, which paid at the rate of Rs 3 2 and 1 per annum respectively

This Act was repealed by Act II of 1862, the year in which the minimum taxable income under the Income Tax Act was raised to Rs 500

3 **License Tax Act of 1867 (XXI of 1867)**, so called because all persons taxable thereunder had to take out a license on which the taxation prescribed by the Act was charged But Government servants were not

(i) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged

But the Courts shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before them —

As to illustration (a)—A shop-keeper has in his till a marked rupee soon after it was stolen and cannot account for its possession specifically, but is continually receiving rupees in the course of his business.

As to illustration (b)—*A*, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery *B*, a person of equally good character who also took part in the arrangement, describes precisely what was done and admits and explains the common carelessness of *A* and himself,

As to illustration (b)—A crime is committed by several persons *A*, *B* and *C*, three of the criminals, are captured on the spot and kept apart from each other Each gives an account of the crime implicating *D*, and the accounts corroborate each other in such a manner as to render previous concert highly improbable

As to illustration (c)—*A*, the drawer of a bill of exchange, was a man of business. *B*, the acceptor, was a young and ignorant person completely under *A*'s influence,

As to illustration (d)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course.

As to illustration (e)—A judicial act the regularity of which is in question, was performed under exceptional circumstances,

As to illustration (f)—The question is, whether a letter was received. It is shewn to have been posted, but the usual course of the post was interrupted by disturbances

As to illustration (g)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family

As to illustration (h)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked

As to illustration (i)—A bond is in possession of the obligor but the circumstances of the case are such that he may have stolen it

"The effect of this provision, coupled with the general repealing clause at the beginning of the Bill, is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts, and that they are to be subject to no technical rules whatever on the subject The illustrations given are, for the most part, cases of what in English law are called presumptions of law, artificial rules as to the effect of evidence by which the Court is bound to guide its decision, *subject, however*, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the section in question I am not quite sure whether, in strictness of speech, the rule that an accomplice is unworthy of credit, unless he is confirmed, can be called a presumption of law, though, according to a very elaborate judgment of Sir Barnes Peacock's, it has, at all events, some of the most important characteristics of such a presumption Be this how it may, the indefinite position in which it stands has been the cause of endless perplexity and frequent failure of justice On the one hand, it is clear law that a conviction is not illegal because it proceeds on the uncorroborated evidence of an accomplice; on the other hand, it seems to be also law that, in cases tried by a jury, the Judge is bound by *law to tell them that they ought not to convict on such evidence, though they* can if they choose How a Sessions Judge (sitting without a jury) is to give himself a direction to that effect, and how a High Court is to deal with a case in which he has convicted, although he told himself that he ought not to convict, I do not quite understand At all events, it seems to me quite clear that he ought to be at liberty to use his discretion on the subject Of course, the fact that a man is an accomplice forms a strong objection, in most cases, to his evidence, but every one, I think, must have met with instances in which it is practically impossible to doubt the truth of such evidence, although it may not be corroborated, or although the evidence by which it is corroborated is itself suspicious

"As I have already observed, I do not wish to trouble the Council with technicalities but I hope this explanation will show that this part of the Bill, at all events, is not incomplete.

"I may observe that many topics closely connected with the subject of evidence are incapable of being satisfactorily dealt with by express law. It would be easy to dilate upon the theory on which the whole subject rests, and the manner in which an Act of this kind should be used in practice I think, however, that it would not be proper to do so on the present occasion I have therefore put into writing what I have to say on these subjects and I propose to publish what I have written, by way of a commentary upon, or introduction to, the Act itself I hope that this may be of some use to the Civil Servants who are preparing for their Indian career, and to the law students in Indian Universities The subject is one which reaches far beyond law, for the Law of Evidence is nothing unless it is founded upon a rational conception of the manner in which truth as to all matters of fact *whatever ought to be investigated.*

"I now turn to a criticism made on the Bill by His Honour the Lieutenant Governor of Bengal, who appears to be somewhat dissatisfied with the manner in which the Bill deals with the question of relevancy, which, as he says, is a question of degree

> 'The Lieutenant Governor has no doubt that the law clearing up the obscurity now prevailing as to rules of evidence, protecting our Courts from the intrusion of a foreign law of evidence in no way applicable and rendering the Judges in some degree masters in their own Courts, will be highly beneficial. His principal doubt is whether it is possible to define by law what evidence is relevant and what is not. He is inclined to think that relevancy is a question of degree, that the relevant shades off into the irrelevant by imperceptible degrees. It may be that it is easier to decide in each case what is substantially material to the issue, or so remote in its relevancy that the time of the Court should not be occupied, than to lay down by rule of law what is to be considered relevant and what not. Such rules must not necessarily be somewhat refined and as it were metaphysical. If it were allowed to argue the question whether any piece of evidence is, or is not admissible under such rules, the Lieutenant Governor would fear that the Court might be lost in disputation. If, however, the rules regarding relevancy be treated as merely an authoritative treatise on evidence for the guidance of Judges, which they are to study and follow as well as they can, but that they are not bound to hear objections and arguments based upon it, the Lieutenant-Governor has no doubt that the rules in the draft are admirably suited to the purpose, and would be extremely useful. It does not seem to him very clear in the draft whether or no counsel are to be entitled to take objection to evidence at every turn and to argue the question as to whether it is or is not admissible under the evidence rules. It seems of great importance that this should be made clear, for if counsel may object and argue, the Lieutenant Governor certainly has great fear that the argumentations regarding relevancy will be endless.'

"I cannot altogether agree with these remarks. As to the arguments of counsel, I do not feel that horror of them which His Honour appears to feel. It is, I think, abundantly clear that counsel will be permitted to argue as to the relevancy of evidence, and as to the propriety of proof, and I do not see how a law can be laid down at all upon which counsel are never to argue. No one, I think, will seriously assert that lawyers, as a class, are an impediment to the administration of justice, or otherwise than an all but indispensable assistance to it; but if they are to exist at all, they must argue as well on evidence as on other subjects. I must, however, observe that every precaution has been taken to prevent useless and trifling arguments. In the first place, if the Judge wishes to know about any fact, the relevancy of which is under debate, he can cut the matter short by asking about it himself under section 165. In the second place, the mere admission or rejection of improper evidence is not to be a ground for a new trial or the reversal of a decision. The fact that the opposite is the rule in England is the great cause of the enormous intricacy and technicality of English law on this point. If, in the Tichborne case, one single question had been permitted after being objected to, and if the Court had afterwards been of opinion that it had been wrongly permitted, then, however trifling the matter might have been, the party whose objection had been wrongly overruled would have been by law entitled to a new trial, and the whole enormous expense of the first trial would have been thrown away. This never was the law in India, nor will it be so now. The result is, that the provisions about relevancy will be useful principally as guides to the Judges and the parties, and, in particular, as rules which will enable the Judge to shut out masses of irrelevant matter which the parties are very likely to wish to introduce. As to the more general question, I think that it is possible to give the true theory of the relevancy of facts, and if I thought it desirable to enter upon a very abstract matter in this place, I think I could show what this theory is, and how this Bill is founded upon it. Be this, however, as it may, and taking a view, not indeed less practical, but more immediately and obviously practical, I would make the following observations:—I am quite aware that relevancy is, as His Honour observes, a matter of degree, and for that reason the Bill gives definitions of it so wide and various, that I think they will be found to include every sort of fact which has any distinct assignable connection with any matter in issue. The sections which define relevancy are, indeed, enabling sections. Any fact which fulfils any one of the many conditions which they declare to constitute relevancy will be relevant, and most facts which have any real connection with the matter to be proved would fulfil several of them. Take, for instance, this fact—A man is charged with theft, and it is proved that he was seen running away immediately after the theft with the stolen goods in his hand. This is (1) a fact so connected with a fact in issue as to form part of the same transaction, and is therefore relevant under section 6; (2) it is the effect of a fact in issue, and is therefore relevant under section 7; (3) it is the conduct of a party to the proceeding subsequent to a fact in issue, and is so relevant under section 8; (4) it is a fact which in itself renders a fact in issue highly probable, and is therefore relevant under section 11. This fact, therefore, is relevant under no less than four sections, each of which would admit a great number of facts which would not be admitted by the other sections. Indeed, the latitude of the definition of relevancy will be best appreciated by negativing the conditions which the Act imposes. Suppose that you are able to assert of a fact that it is neither itself in issue, nor forms part of the same transaction, nor is its occasion, cause or effect, immediate or otherwise, that it shows no motive or preparation for it; that it is no part of the previous or subsequent conduct of any person connected with the matter in question; that it does not explain or introduce any fact which is so connected with the matter in question, or rebut or support any inference suggested thereby, or establish the identity of any person or thing connected with it, or fix the time of any event the time of

which is important, that it is not inconsistent with any relevant fact or facts in issue, and that, neither by itself, nor in connection with other facts, does it make any such fact highly probable—if all these negatives can be affirmed I think we may say, without much risk of error, that the one fact has nothing to do with the other, and may be regarded as irrelevant

"I now come to a matter which has excited a good deal of discussion, though it relates to a subordinate and not very important part of the Bill—that which concerns the examination of witnesses by counsel The Bill as originally drawn provided, in substance, that no person should be asked a question which reflected on his character, as to matters irrelevant to the case before the Court without written instructions that if the Court considered the question improper, it might require the production of the instructions, and that the giving of such instructions should be an act of defamation, subject, of course, to the various rules about defamation laid down in the Penal Code To ask such questions without instructions was to be a contempt of Court in the person asking them, but was not to be defamation

"This proposal caused a great deal of criticism, and in particular produced memorials from the Bars of the three Presidencies It was also objected to by most of the Local Governments to whom the Bill was referred for opinion Some of the objections made to the proposal, were, I thought, well founded It was pointed out, in the first place, that the difficulty of obtaining the written instructions would be practically insuperable, in the next place, that the Native Bar throughout the country were already subject to forms of discipline which were practically sufficient, and, in the third palce—and perhaps this was the most important argument of all—that, in this country, the administration of justice is carried on under so many difficulties and is so frequently abused to purposes of the worst kind, that it is of the greatest importance that the characters of witnesses should be open to full inquiry These reasons sastisfied the committee, and myself amongst the rest, that the sections proposed would be inexpedient, and others have accordingly been substituted for them which I think will in practice be found sufficient The substituted sections are as follows —

'146. When a witness is cross examined, he may in addition to the question hereinbefore referred to, be asked any question which tend

(1) to test his veracity

(2) to discover who he is and what is his position in life, or

(3) to shake his credit by injuring his character although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture

147 If any such question relates to a matter relevant to the suit or proceeding the provisions of section 132 shall apply thereto

148 If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character the Court shall decide whether or not the witness shall be compelled to answer it and may if it thinks fit warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations

(1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on matter to which he testifies.

(2) Such questions are improper if the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect or would affect in a slight degree the opinion of the Court as to the credibility of the witness on the matter to which he testifies

(3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness s character and the importance of his evidence

(4) The Court may if it sees fit, draw, from the witness s refusal to answer, the inference that the answer if given, would be unfavourable.

149 No such question as referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded.

Illustrations.

(a) A barrister is instructed by an attorney or vakil that an important witness is a dacait. This is a reasonable ground for asking the witness whether he is a dacait.

(b) A pleader is informed by a person in Court that an important witness is a dacait. The informant on being questioned by the pleader gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dacait.

(c) A witness, of whom nothing whatever is known, is asked at random whether he is a dacait There are here no reasonable grounds for the question.

(d) A witness of whom nothing whatever is known being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dacoit.

150. If the Court is of opinion that any such question was asked without reasonable grounds it may if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

151. The Court may forbid any question or inquiries which it regards as indecent or scandalous although such questions or enquiries may have some bearing on the question before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy or which, although proper in itself, appears to the Court needlessly offensive in form."

"The object of these sections is to lay down in the most distinct manner, the duty of counsel of all grades in examining witnesses with a view to shaking their credit by damaging their character. I trust that this explicit statement of the principles according to which such questions ought or ought not to be asked will be found sufficient to prevent the growth, in this country, of that which in England has on many occasions been a grave scandal. I think that the sections, as far as their substance is concerned, speak for themselves, and that they will be admitted to be sound by all honourable advocates and by the public. I cannot leave the subject without a few remarks on the memorials which the sections originally proposed have called forth from the Bar in various parts of the country. As none of the bodies in question have made any further remarks on the Bill since it appeared in the *Gazette* in its amended form, about a month ago, I suppose that the alterations made in the Bill have removed the main objection which they felt to it. I need not therefore notice those parts of their memorials which were directed against the consequences which they apprehended from the sections which have been given up. They contain, however, other matter which I feel compelled to notice. I need not refer to all the memorials. The one sent in by the Calcutta Bar was for the most part proper, though it contained passages which I think might as well have been omitted. The memorial of the Bombay Barristers contains similar passages, expressed more fully and less temperately, and I shall accordingly confine myself to noticing such of their remarks as appear to me to deserve notice.

I may observe in the first place, in general, that I have read in the newspapers and in these memorials much that can only mean that I individually was actuated in drawing this Bill by hostility to the Bar. Indeed the Bombay memorial says, in so many words, that remarks made by one member (meaning I suppose me) in Council 'appear to contemplate the extinction of the profession of a Barrister-at-law in India.' In support of this surprising statement they quote as being 'open to no other construction,' the following words from the report of the Select Committee:—

> The English system, under which the Bench and the Bar act together and play their respective parts independently, and the professional organization on which it rests, does not as yet exist in this country, and will not for a very long course of time be introduced.

Before I made the remarks which this suggests, let me ask your Lordship and the Council whether a charge that I, of all people, wish for the extinction of the profession of Barrister-at-Law in India, is not upon the face of it absurd? I am myself a Barrister of eighteen years standing, and a Queen's Counsel of four years' standing. I believe, that there is no Barrister in British India of whom I should not be entitled to take precedence, professionally, if I chose to practise here, and so strong is my connection with my profession, that I am at this moment on the point of resigning one of the most responsible offices which a Barrister can hold, for the purpose of returning to the ordinary routine of professional practice. How is it possible to imagine that a man so situated should be hostile to the profession? When this Bill was introduced I was—as I still am—anxious to do whatever lies in my power to preserve the honour and dignity of my profession, and to prevent its good name from being disgraced. For this reason, I devised what I regarded as an appropriate remedy for a great and crying evil—one with which I have been much impressed by my own observations in England and which is likely to extend in India as the habit of cross-examination becomes more general, and when the rights which a cross-examining advocate has are explicitly defined. The remedy, I will admit, was to some extent inappropriate, but for merely proposing *it*, *for merely recognizing the existence of the evil against which it was directed*, I am charged with wishing to extinguish my own profession.

"The real meaning of the expressions in the report (for which I am fully responsible) was, I think, so plain, that I cannot understand how the memorialists can have ascribed to them a sense which I think they could never suggest to any fair mind. The report said:—

> 'The English system, under which the Bench and the Bar act together and play their respective parts independently, and the professional organization on which it rests, do not as yet exist in the country and will not for a very long course of time be introduced.'

"'Yes,' say the memorialists, 'it does exist, to wit, in the Presidency towns.' This is as much as if the water works of Calcutta were referred to, to contradict a statement that

India is wretchedly supplied with drinking water I make a statement about an Empire as large as Europe without Russia, and am told that it is incorrect, because there are three English Courts, and three knots of, perhaps, a dozen or so English Barristers to be found at towns which are in the nature of English settlements The reason why the statement complained of was not qualified by excepting these towns and courts, was simply that the exception was not important enough to be stated It would, indeed, have been matter of great indifference to me, personally, whether the Bill extended to the High Courts sitting on the original side or not It is a mistake to make exceptions without a necessity for them, but the question, what rules of evidence should apply in the Presidency towns is one of very little real importance The great and vital importance of the matter lies in the effect which it will have on the administration of justice throughout the country at large It is framed in order to meet the wants, and lighten the labours, of district officers, by giving them a short and clear view of a subject which has been converted into a sort of professional mystery, the knowledge of which was confined to a knot of persons specially initiated in it Now, as regards the Mofussil, I repeat the expressions complained of I assert that they are absolutely true and state a fact notorious to everyone I say that, throughout India generally, nothing like the English system under which the Bench and the Bar act together and play their respective parts independently, does now exist, or can for a length of time be expected to exist Let me just recall for a moment the nature of that system In the first place the Bench and the Bar in England form substantially one body The Judges have all been Barristers, and the great prize to which the Barristers look forward is to become Judges

"That is not the case in India, nor anything like it The great mass of Indian Judges are not, and never have been lawyers at all the great mass of Indian lawyers have no chance or expectation of becoming Judges and many of them have no wish to do so Even in the Presidency towns, the whole organization of the profession differs from that of England in ways which I do not think it necessary to refer to, but which are of great importance I may, however, observe that the position of an English Barrister who practises in the Mofussil, whether he is habitually resident in the Presidency town or not, is altogether different from that of an English Barrister in his ordinary practice in England An English Barrister on circuit, and even at the Quarter Sessions, is subject to a whole series of professional restraints and professional rules which do not, and cannot, apply to practice in the Mofussil in this country He acts under the eyes of a public which takes great interest in his proceedings, and puts a powerful check upon him He practises in important cases before Judges whom he feels and knows to be his professional superiors, and to whom he is accustomed to defer No one of these remarks applies to a Barrister from a Presidency practising in the Mofussil The results of this state of things must be matter of opinion. It is impossible to discuss the subject in detail The Bombay and Calcutta memorialists consider it eminently satisfactory, let us hope they are right My opinion of course, is formed upon grounds which it is not very easy to assign, and, as it can be of little importance, I shall not express it. In any case this Bill can do no harm

"Passing, however, from the case of English Barristers to the case of pleaders and vakils and the Courts before which they practise, I would appeal to everyone who has experience of the subject, whether the observations referred to are not strictly true, and whether the main provision founded upon it there—the provision which empowers the Court to ask what questions it pleases—is not essential to the administration of justice here In saying that the Bench and the Bar in England play their respective parts independently, what I mean is that, in England, cases are fully prepared for trial before they come into Court so that the Judge has nothing to do but to sit still and weigh the evidence produced before him In India, in an enormous mass of cases, this neither is nor can be so It is absolutely necessary that the Judge should not only hear what is put before him by others but that he should ascertain by his own inquiries how the facts actually stand In order to do this it will frequently be necessary for him to go into matters which are not themselves relevant to the matter in issue, but may lead to something that is and it is in order to arm Judges with express authority to do this that section 165 which has been so much objected to, has been framed

"I have now referred to the main points in the Bill which have been attacked, and as I fully explain the principles on which it was founded more than a year ago, I have only to move that it may be taken into consideration '

The motion was put and agreed to

The Hon ble Mr Stephen then moved the following amendments:—

That, in section 8, instead of the second paragraph, the following be substituted:—

"The conduct of any party or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding or in reference to any fact in issue therein or relevant thereto and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto

That, in section 9 line 3, after the word ' which," insert the words ' support or "

That in the explanation to section 57 instead of the words "the Parliament of the United Kingdom of Great Britain, of England, of Scotland, and of Ireland," the following be substituted—

(1) The Parliament of the United Kingdom of Great Britain and Ireland,

(2) The Parliament of Great Britain

(3) The Parliament of England

(4) The Parliament of Scotland and

(5) The Parliament of Ireland"

That the words "or in any other case in which the Court thinks fit to dispense with it" be added to the proviso in section 66

That the following new section be inserted after section 157 —

"158. Whenever any statement, relevant under section 32 or 33, is proved all matters may be proved either in order to contradict or corroborate it, or in order to impeach or confirm the credit of the person by whom it was made which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

And that the numbers of the subsequent sections be altered accordingly

The motion was put and agreed to

His Honour the Lieutenant Governor would ask the permission of His Excellency the President to move an amendment of which he had not given notice He would observe that the Council had had very short notice of this Bill being brought forward and passed to-day The amendment which His Honour intended to propose was not of much importance it was simply to lop off a dead branch of the Bill, namely, section 150

The Hon'ble Mr Stephen said that the section to which His Honour the Lieutenant Governor referred was one of considerable importance, to which great weight was attached He might say that the Council ought to have had notice of such an amendment It was, moreover, a matter which would give rise to a great deal of discussion

His Honour the Lieutenant Governor believed he was correct in saying that the Council had not had notice until yesterday or the day before that the Bill was to be brought forward He would not have asked, at this stage, for leave to move a substantive amendment his amendment was merely to lop off a dead branch

His Excellency the President thought that this was a question of great importance, and that notice should have been given of the intention to move the amendment

His Honour the Lieutenant Governor said that, as His Excellency the President was of opinion that the notice of the amendment should have been given, His Honour did not think that his amendment was of sufficient importance to delay the passing of the Bill

The Hon'ble Mr Cockerell felt very much inclined to support His Honour the Lieutenant Governor in his attempt to have an amendment in the sense which His Honour had indicated brought forward, and thought that there were probably other members who were of the same opinion The section which it was proposed to omit was a dead branch, which it would be very well to get rid of Mr Cockerell had proposed a similar amendment in committee, but had been overruled

His Excellency the President observed that there seemed to be a strong feeling in favour of the amendment, and although he was sorry that any further delay should occur to the inconvenience of business he thought that an adjournment of this Bill might, under the circumstances, be advisable

The Hon'ble Mr Stephen said that, looking to the great pressure of business before the Council, he would much rather consent to the amendment being brought on at once than that there should be an adjournment

His Honour the Lieutenant Governor would express a strong opinion that his amendment was not of sufficient importance to call for an adjournment

His Excellency the President had not had an opportunity of considering the nature of the amendment which His Honour the Lieutenant Governor, wished to propose, but he would be happy to act according to the prevailing opinion of the Council. The Hon'ble Member in charge of the Bill had himself expressed a desire that the amendment should be brought on and settled to-day

His Honour the Lieutenant Governor then moved the omission of section 150 He had already stated, in regard to the amendment nearly all that he had to say, namely, that the section was really a dead branch, without any effect or practical meaning whatever It would not be necessary for him, therefore, to detain the Council with many words upon the subject It seemed to him that this section was the shadow of a real provision which had been struck out of the Bill, and which was past and gone The Hon'ble Member in charge of the Bill had explained at considerable length, and in an extremely lucid manner, the circumstances under which a group of sections found place in the Bill, namely, sections 146 to 150 His Honour might say, broadly, that the effect of these sections, down to

section 149, was to prescribe that certain questions affecting the character of witnesses might under certain circumstances, be admitted, and that, under certain other circumstances, such questions ought not to be admitted Well as the Bill was originally drawn it not only laid down what questions should be admitted and what questions should not be admitted, but another section prescribed penalties for the improper putting of such questions by advocates or other persons engaged in a case After a great deal of discussion, he believed these penal provisions were struck out of the Bill The consequence was that advocates engaged in a case were subject, with regard to the putting or not putting of such questions to no special penalties, but only to those rules which guided and governed an advocate's professional conduct in regard to these as to all other matters Well, then, if it be, as he said, that this section provided no penalty at all, and provided no course of proceeding wh ch the Court was not competent to take without it it was in fact a fiction and a sham, a weak and defective compromise of a matter which had been disposed of His Lordship and the Council were aware that, in this country, Courts of all descriptions, from the higher to the lower, were subject to the control of the highest Court each was subject to the direct control of the Court under which it acted and by which it was supervised No law was necessary to enable an inferior Court to report to the superior Court any matter affecting any advocate who held his license from that Court It seemed to His Honour that this provision was much more in the nature of a section to enable a teacher to report a boy to his parents or to one who held a moral or legal control over him The section was of no practical effect, but to some extent disfigured the Bill, as being a fictitious shadow of a reality which had passed away, and His Honour therefore purposed to omit it

The Hon'ble Mr Cockerell entirely agreed with what had fallen from His Honour the Lieutenant Governor, and, in his opinion, if any provision of this kind could properly find a place in a legal enactment, it should rather be in a Bill relating to pleaders such as the Bill on that subject, which was already before the Council It seemed to him (Mr Cockerell) entirely out of place in a Bill of this kind He had always entertained this opinion, and pressed it in Committee, and he thought His Honour had correctly described the clause referred to as a dead branch But, as it was one which could do no harm, Mr Cockerell had not thought it necessary to repeat his opinion of the subject and press his views upon the Council As, however, the matter had been taken up, he was exceedingly glad to have this opportunity of expressing his full concurrence in the Lieutenant Governor's suggestion

The Hon'ble Mr Chapman could not help thinking that the provision which His Honour the Lieutenant Governor proposed to omit was not a dead branch, but a branch which had some vitality in it If advocates practising in the Mofussil knew that their conduct could be liable to be reported to the High Court, and thus brought to the notice of the profession, he thought this knowledge might act as a salutary check against those who were likely to abuse the liberty of the Bar

The Hon ble Mr Robinson joined entirely in the view taken by his hon ble friend Mr Chapman He thought that the provision of section 150 would act as a very wholesome check upon vakils who practised in up country Courts They aspired to rise to the judicial service, and it was desirable that the High Court should know something of the character of the men practising in the Lower Courts, and more especially have their shortcomings brought before them Mr Robinson thought that the provision which it was proposed to omit, was a very good one, and he would therefore vote against the amendment

Major General the Hon'ble H W Norman thought, on the whole, that the section should be retained it might be the means of doing some good and he thought it could not do any harm

The amendment was then put and negatived

The Hon ble Mr Stephen then moved that the Bill as amended be passed He would not trouble the Council with any further remarks

His Honour the Lieutenant Governor said he would not like to let this motion pass without saying a few words, he had passed so long a portion of his life in dealing with evidence, that he hardly liked to say he was at the last moment compelled to take this Bill upon trust but he might say that he had placed his trust in a quarter in which it could be very well placed It was a Bill that, he believed, had received thorough consideration and thorough sifting in a most thorough and systematic manner

It was in the hands of a man who was so extremely free from antiquated prejudice and antiquated notions, that he hoped the Bill had been made as good as a Bill of this kind could be expected to be made in the hands of any man His Honour had on a former occasion expressed his opinion against any law of evidence for this country He had doubts whether any legal law of evidence, as distinguished from moral and metaphysical laws, were really a good thing But at the same time he felt that things had taken that course, and the circumstances were now such that it was hopeless to avoid some law of evidence, and he hoped and believed that a law of evidence, freed from intricacies and technicalities had this very great advantage to the Courts of the country, that it at least put them, in respect of the law on an equal footing with the Advocates practising before them It enabled the Judge to

say to the Advocate, "I am as good a man as you if you raise a question of evidence there is the law by which your question can be decided." It would put a stop to the practice hitherto prevalent, of an Advocate shaking in the face of the Court a mysterious law of evidence which was not to be found codified anywhere as substantive law or otherwise, in any shape admitting of its being easily referred to by our Judges and judicial officers of all grades. His Honour could have wished that the Hon'ble Member in charge of the Bill had not found it necessary to tell the Council that the Bill was to a considerable extent based on *Taylor on Evidence* because His Honour's view was that it was not desirable to take any dictionary of English law as the basis of a law of evidence in this country If he could find any ground for objecting to any part of the Bill, it was that in some parts, it somewhat smelt of the English law of evidence but he hoped that most of the sting of Taylor had been taken out of him by the Hon'ble Member in charge of the Bill, and by the Committee in the course of their manipulations of the Bill His Honour was also in one respect glad to observe that the Bill had been reconsidered and that the result of that consideration was that it had come out of the hands of the Select Committee very much reduced in point of the metaphysics which were somewhat conspicuous in the first draft That being so, and the Act being as the Hon'ble Member had explained, made large and wide, and constructed in such a manner as by many meshes to bring into its scope almost every possible fact, he might say that he looked upon the passing of this Bill as hopefully as he would look upon the passing of any law of evidence, that he hoped for the best, and should look to the great wideness of its provisions as a means of enabling the Courts to make the best of the law For himself, in that view, he accepted it and thanked the Hon'ble Member for it

The Hon'ble Mr Strachey expressed, in a few words, his feeling in which he was sure the Council would agree, that India owed to his hon'ble and learned friend a great debt of gratitude for this Bill, which was now about to be passed Mr Strachey was confident that his hon'ble and learned friend had by this Bill conferred upon the country an important benefit of which they would see the result hereafter in a really great improvement in the administration of justice in India

The Council had to thank Mr Stephen for a very great deal of admirable work, and Mr Strachey was sure that his name would long be remembered in India through this work in particular, which was now about to be completed

The motion was put and agreed to

The Council adjourned to Tuesday, the 19th March, 1872

The Council met at Simla on Thursday, the 15th August, 1872

EVIDENCE ACT AMENDMENT BILL

The Hon'ble Mr Hobhouse moved for leave to introduce a Bill to amend the Indian Evidence Act, 1872 He said that the object of this Bill was to amend some defects to *which attention had been called by the Legislative Department and which were owing to a* very common incident attending the passing of new Acts, namely, the total repeal of prior Acts of which it was intended to re-enact large portions, and the omission of some of those portions from the new Act He would only mention in detail the most important point. This related to the power of administering an oath Act I of 1872 repealed the whole of Act XV of 1852 One of the sections of the Act of 1852 contained the authority on which most of the High Courts in India and Commissioners, Arbitrators, and other persons acting in suits depending before them, administered oaths to witnesses. By an accident the section had not been re-enacted Mr Hobhouse had no such knowledge of the Indian Statute book as would enable him to say of his own authority that such a power to administer oaths did not somewhere exist But the Secretary had assured him that he could not find any such, so far at least as regarded Commissioners and Arbitrators, and Mr Hobhouse thought that the Council might rely on this assurance If such a power for administering oaths to witnesses was suspended for a single day, it might cause great disturbance of the course of justice And even if doubt hung over such a point, it might be very embarrassing

The opportunity had been taken to make corrections of few other errors, being clerical or typographical, or mere slips in drafting, but he would not now enlarge upon them, as the Bill, he hoped, would be published with a full Statement of Objects and Reasons, and would, he trusted, be referred to a Select Committee.

The Council met at Simla on Thursday, the 29th August, 1872.

INDIAN EVIDENCE ACT AMENDMENT BILL

The Hon'ble Mr Hobhouse also presented the Report of the Select Committee on the Bill to amend the Indian Evidence Act, 1872 He said that in considering the Bill the Committee had proceeded on the principle that under the circumstances it was no part of their duty to alter any part of the Act on the score of principle, but only to effect such alterations as they believed the draftsman would have made, if his attention had been called to them The principal reason for passing the present Bill into law before the 1st September was this —

Act I of 1872 repealed *in toto* a prior Act XV of 1852, and one of the sections of that Act was as follows —

"XIIA—Her Majesty's Courts within the British territories under the Government of the East India Company, and every Judge and Justice of such Courts, and every officer Commissioner, Arbitrator or other person now or hereafter having by law or consent of parties, authority to hear receive and examine evidence with respect to or concerning any suit, action, or other proceeding in any of such Courts, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively"

"Now, that was a positive enactment, in the clearest possible terms purporting to confer upon certain tribunals and officers power to administer oaths *Primâ facie*, if that power were removed from the Statute book, and nothing put in its place, it would cease to exist The question then was, whether the power could be derived from any other quarter For the purpose of determining this question, it had been necessary to read five Acts of Parliament and ten Charters, and to read some of these documents very carefully since they were framed on the most perplexing of all principles, the principles of declaring void all previous inconsistent provisions So that you had to read through the whole document to see what was and what was not inconsistent The result was, as well as he (Mr Hobhouse) could make out, that the power of administering an oath would remain with the High Courts, but would not remain with the Commissioners and Arbitrators therein mentioned It was, therefore, important to leave upon the Statute book as clear, extensive an authority as that which was taken out of it and the simplest way of doing that in the present emergency was by continuing the existence of that section When the time came for dealing with that matter finally, the proper place for it would be found in an Act relating to the subject of oaths and affirmations, rather than in one relating to the general subject of evidence

Mr Hobhouse thought it right to mention to the Council that he had received a telegram from Mr H S Cunningham, desiring that the passing of the present Bill might be postponed, until some further communication was received from him Mr Cunningham intimated that he did not think it necessary to continue the section just discussed, and that there were other defects in the Bill Mr Hobhouse thought it right that the Council should decide for themselves in the matter after hearing the reasons for passing the present Bill. Unquestionably the assistance of the gentleman who had had a great share in preparing the Act, would be most valuable in any amendment of it. He probably understood the Act far better than any of the Council, and was aware of many things to which attention had not been called Mr Hobhouse most sincerely regretted that, in his judgment, pressure of time prevented their receiving Mr Cunningham's assistance He (Mr Hobhouse) had previously shown the kind of embarrassment which might arise from the present condition of things He would now try and explain the degree of it Previously to this year, the incapacity to administer an oath would have vitiated many legal proceedings But in the *present year, an Act (No VI of 1872) was passed, which had two objects*—one was to respect and bind the conscience of witnesses, and the other to prevent the entire vitiation of legal proceedings by omissions and irregularities in the administration of oaths The first object had nothing to do with the present question An oath was an oath whatever might be the form of it, and the person who administered it must be duly qualified to do so The second object was important, because it diminished the mischief which might arise from the incapacity of the Judge to administer an oath But it did not prevent the administra*tion of an oath by such incapable person from being an irregularity* Nor was it easy to say how a judge, upon being pressed with such irregularity, would deal with the case Certainly, many a Commissioner and Arbitrator would say, 'inasmuch as no objection is made by the witness, and as an oath is the regular form of proceeding, and as I have, by express legislation, been made incapable to administer one, I decline to go on with the case" Besides this, the Act in question did not affix the penalties of perjury to the giving of false testimony under such circumstances On this point, sections 178 and 171 of the Penal Code showed the importance attached to the *legal administration of an oath* by duly authorized persons.

For the foregoing reasons, Mr Hobhouse could not help thinking that we should be running some appreciable risk of disturbance of judicial proceedings if we did not pass this Bill into law by the 1st September on which day Act I of 1872 was to come into force, whereas no possible injury would be done by continuing the section in question, the only suggestion against it being that it was useless.

With regard to the other amendments, he would not remark upon them in detail They would all speak for themselves, and were intended to cover obvious defects and slips either of writing, or of printing or of drafting We had now received several criticisms on Act I of 1872 and there was little doubt that after it had been tested in actual practice, it would, like most laws of great magnitude and difficulty, and especially those passed on subjects new to legislation, require amendment in several particulars Probably, in the course of a couple of years, it would be necessary to pass another amending Act, and the suggestion of Mr Cunningham would be most valuable for that purpose Mr Hobhouse, therefore thought proper that the better plan would be, not to have any further delay at present, but to keep a careful record of all suggestions sent in and to use them when the time was ripe

APPENDIX C.

(*See* Section 13 p. 189, *ante.*)

Judgment and Decree of the Subordinate Judge of Benares referred to by the Privy Council in *Bhitto Kunwar* v *Kesho Pershad Misser*, 24 I A, 10, s c, 1 C W N., 265 (1897).

No 184

Judgment of Baboo Mirtunjoy Mukerji, Subordinate Judge of Benares, dated 10 h December, 1887

SUIT No 30 OF 1887

Kesho Parshad .. .. *Plaintiff*

versus

Sheodial Tewari *alias* Bacha Tewari and Raja Ajit Singh .. *Defendants*

The defendant Sheodial is the son of one Hemnath Tewari Kaulapat Tewari, brother of Hemnath, had two sons, Debi Parshad and Bhawani Parshad, and a daughter, Mussammat Lachho Kuar Debi Parshad pre deceased Bhawani Parshad Mussammat Rani Kuar and Mussammat Dharma Kuar were the widows of Debi Parshad Mussammat Lacchho Kuar had a daughter named Sadah Kuar, who was married to one Baijnath Misser, father of Ramkishen Misser Bhawani Parshad died a bachelor

Kesho Parshad, the plaintiff to this suit, claims to be the son of Bhondu Misser, who is alleged to have been a brother of Baijnath Misser

The subject-matter in dispute in this suit is one moiety of the estate, which originally belonged to Debi Parshad and Bhawani Parshad, which devolved on the latter by right of survivorship, on the death of the former On the death of Bhawani Parshad, it came into the possession of the widows of Debi Parshad,—Dharma Kuar and Rani Kuar On the death of Mussammat Dharma Kuar, the name of Ramkishen Misser was recorded in the revenue papers in place of the name of Dharma Kuar

On the 4th January 1850, an agreement was entered into between Rani Kuar, Ramkishen Misser and Bacha Tewari whereby one moiety of the estate aforesaid was, according to the allegation of the plaintiff, declared to be the property of Ramkishen, who had been in proprietary possession of it up to the time of his death, which occurred on the 1st January 1873 On his death his widow, Mitho Kuar, got possession of it, and she had been in possession of it up to the time of her death, which happened on the 26th September, 1884

The plaintiff claims to recover possession of it on the death of the widow of Ramkishen as his heir under the Hindu law, setting aside a deed of sale executed by Sheodial Tewari in respect of five villages forming part of the estate of Ramkishen, in favour of the other defendant

The following is the substance of the defence made by the defendants in their written statement —

The plaintiff is not the son of the brother of the father of Ramkishen

He cannot also be his heir, as Ramkishen was adopted by Bhawani Tewari as his son

The suit is barred by limitation, as Sheodial Tewari has been in adverse possession of the estate for more than twelve years next preceding the date of this suit.

Ramkishen Misser had been in possession of the estate as a trustee under the agreement of 1850, and the plaintiff therefore can have no right to claim it as his heir

ISSUES

1 What, if any, relation the plaintiff bore to Ramkishen Misser ?

2 Since when, and of which right, have the defendants been in possession of the property in dispute, *and what was the nature of their possession ?*

3 When, if ever, had Mussammat Mitho Kuar been in possession of it, and what was the nature of her possession ?

4 *Of what right had Ramkishen Misser been in possession ?*

5 Did Bhawani Prashad Tewari revoke the will he had made during his lifetime, and was it acted upon after his death ?

6 *Does limitation bar this suit ?*

7 Has the plaintiff a better right to the property in dispute than the defendants ?

8 What sort of decree, if any ought to be granted to the plaintiff ?

JUDGMENT

On the sixth issue the Court holds that the suit of the plaintiff is not barred by limitation as it has been brought within twelve years from the death of Mitho Kuar, widow of Ram Kissen Misser the time prescribed by Article 141 of the second Schedule of the Indian Limitation Act. It is also not barred by limitation, as Mitho Kuar had been in possession of the property in dispute up to 1286 Fasli (1879) as would appear from the record of rights, *wherein her name was all along as patnidar until the time of the recent settlement, when* her name was expunged

On the 1st issue the Court holds it proved by the evidence of the plaintiff himself, of Pahoon Misser, brother in law of Ramkishen, of Anandi Kuar, his sister and of Thakura Kuar, his stepmother, that he (the plaintiff) is the son of Bhondu Misser, brother of Baijnath Misser, father of Ramkishen Misser

On the 2nd issue the Court finds that the *defendant Sheodial Tewari has been in possession of the estate of Bhawani Parshad jointly with Ramkishen, under the agreement of the 4th January 1850 as proprietor of one moiety of it* It is evident from the records of the litigation, 1876, that Bacha Tewari and Ramkishen Misser have been dealing with it as it was their own property On the 4th September 1877, Bacha Tewari mortgaged a portion of the estate to Balgobind Das This mortgage was upheld by the Hon ble High Court, by its decision of the *10th March 1884, which was upheld by the Full Bench on the 31st* January 1885 It must be held, therefore that the defendant Bacha Tewari has been in possession of the share of Ramkishen in the estate aforesaid since 1879, when the name *of Mitho Kuar was expunged from the revenue records.*

On the 3rd issue I find that Mitho Kuar had been in possession of Ramkishen's share of the estate as its proprietress till 1879, up to which time she was recorded its *patnidar*.

On the 4th issue the Court finds that Ramkishen Misser had been in possession of it *as its proprietor by virtue of the agreement of the 4th January 1850 It was contended on* behalf of the defendants that the agreement which recognised the Will of Bhawani Parshad, dated the 27th August 1842, constituted Ramkishen a trustee of the property for certain trusts created by the will and in support of this contention they rely on a decision of a Division Bench of the High Court, dated the 27th February 1878, which they maintain estops the plaintiff from averring in this suit, that it was Ramkishen's own property in which he could have a personal proprietary right This Court, after carefully considering the arguments of the learned pleaders for the defendants, and the authority quoted by them in support of their argument, is unable to come to the conclusion that that decision is a *res judicata* to the present suit The suit in which the decision was passed was brought by Bacha Tewari to set aside an auction sale of certain properties in execution of a decree obtained on certain mortgages made by Mussammat Mitho Kuar, widow of Ramkishen It set aside the auction sale, holding that Mitho Kuar was not competent to mortgage them *It did not directly decide the question as to whether the will of Bhawani Parshad was re*voked by him during his lifetime, nor did the Court of First Instance, in appeal from whose decision it was passed directly, finally pass any adjudication on that point On the other hand, the Full Bench decision noticed above distinctly finds that the will was revoked This decision was passed on a case in which an outsider tried to have it declared that the *estate was in the possession of Bacha Tewari as a trustee under the will This decision, in the opinion of the Court, is admissible in evidence against Bacha Tewari, although the plaintiff was not a party to it, as showing the character of the possession of Ramkishen and Bacha Tewari over the estate in respect of which the agreement in* 1850 *was made* The will of Bhawani Parshad, the defendant admits in his mortgage deed, dated the 4th September 1877, *was revoked*, and the *Court is not prepared to rule in the teeth of this express ad*mission that the decision of the 27th February 1878, constitutes conclusive evidence that the will was not revoked The copy of the will now forthcoming shows that Avadh Behari Lal was appointed executor by the will, but there is not a tittle of evidence in any shape whatever to show that he ever accepted his position as such executor, or made any attempt *to carry out its provisions On the other hand the terms of the agreement seem to the Court* to be utterly subversive of the provisions of the will, which makes no provision whereby Ramkishen or Bacha Tewari could have had any pretence for obtaining possession of any portion of the estate of the testator Had the will been acted upon, they could have no right to the possession of the estate under it, and the fact that they got possession of it under *the agreement constitutes almost conclusive evidence that it was never acted upon*

On the 5th issue the Court finds for the reasons given in its decision on the 4th issue that the will of Bhawani Parshad was revoked by him during his lifetime, and that, granting for the sake of argument that it was not so revoked, it was never acted upon, and that *Ramkishen and Bacha Tewari have been in proprietary possession of the estate under the agreement of* 1850, *adversely to the trusts, if any, created by the will*

On the 7th issue the Court holds that the plaintiff, as son of the uncle of Ramkishen, is entitled to the property in dispute in preference to the defendants, there being no evidence to show that he was adopted by Bhawani Parshad Tewari

On the 8th issue the Court holds that the plaintiff, as heir of Ramkishen Misser, is entitled to the reliefs sought

ORDER.

The suit is decreed with costs.

Dated 10th December, 1887. (Sd) MIRTUNJOY MUKERJI,
Subordinate Judge

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